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In the
Supreme Court of the United States

ORIENT OVERSEAS CONTAINER LINE LIMITED,
CP SHIPS (UK) LIMITED, CPS NO. 3 LIMITED and CPS
NO. 5 LIMITED and the M/V CANMAR PRIDE, *in rem*,
Petitioners,

v.

ROYAL INSURANCE COMPANY OF AMERICA and
FORD MOTOR COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Contrary to the Sixth Circuit's decision, when the United States Carriage of Goods by Sea Act, 46 U.S.C.S. § 30701 ("COGSA"), applies as a matter of law, as the Sixth Circuit held, must clear and unambiguous language be used in a bill of lading for the carrier to voluntarily increase its liability above COGSA's $500 per package limit as the Eleventh Circuit specifically held in *Itel Containers v. TITAN SCAN*, 139 F.3d 1450 (11th Cir.), *cert denied*, 525 U.S. 962 (1998)?

2. Did the Sixth Circuit fail to follow this Court's rationale in *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14 (2004) when, after holding that COGSA applied as a matter of law, it construed the carrier's bill of lading so that the carrier was found to have voluntarily increased its liability above that established by COGSA?

3. In determining whether the carrier voluntarily waived the COGSA limitation of liability, should the *contra proferentem* doctrine be applied in favor of the shipper and against both the carrier which drafted the bill of lading and other parties which did not draft the bill of lading when the carrier and the shipper possessed equal bargaining power and were represented by counsel?

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Orient Overseas Container Line Limited states that there are no known parents, affiliates and/or publicly held companies that own more than 10% of its stock. Petitioners CPS No. 3 Limited, CPS No. 5 Limited, CP Ships (UK) Limited and the M/V "CANMAR PRIDE" are indirectly owned 100% by TUI AG, a German Public Company.

All parties to the proceedings are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Orient Overseas Container Line Limited ("OOCL") and CPS No. 5 Limited, CPS No. 3 Limited, CP Ships (UK) Limited and the M/V CANMAR PRIDE ("CP Group") (referred to collectively with OOCL as "Petitioners") respectfully petition the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The amended opinion of the Sixth Circuit after reconsideration (Pet. App. *infra*, 1a-42a) is reported at 525 F.3d 409 (6th Cir. 2008). The district court's order granting partial summary judgment in favor of Petitioners (Pet. App. 45a-65a) is reported at 408 F. Supp. 2d 415 (E.D. Mich. 2005), and the orders granting the interlocutory appeal (Pet. App. 87a-90a) are unreported.

JURISDICTION

The amended judgment of the Court of Appeals was entered on May 8, 2008, after a timely petition for rehearing was denied. (Pet. App. 43a-44a). The jurisdiction of this Court rests on 28 U.S.C.S. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C.S. § 30701 (2006), is relevant and, in particular, section 4(5) which states:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> * * *
>
> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Also involved is the Ocean Shipping Reform Act of 1998 ("OSRA"), which amended the Shipping Act of 1984, 46 U.S.C.S. § 40101 *et seq.*

Federal maritime law governs the extent and surrender of any and all of the carrier's rights and liabilities under COGSA in bills of lading and service agreements. *See Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 23 (2004).

STATEMENT OF THE CASE

This case involves an ocean carrier's[1] ability to rely on the limit of liability of $500 per package established by COGSA when, as the Sixth Circuit correctly found, COGSA applies as a matter of law and not merely as a matter of contract. (Pet. App. 19a). In reversing the decision of the district court, which also held that COGSA applied as a matter of law, the Sixth Circuit held that, despite the application of COGSA's liability limitation, the carrier had agreed or contracted to increase its liability beyond COGSA by more than twenty-fold. (Pet. App. 29a-42a). The Sixth Circuit failed to follow the doctrines of contract construction and uniformity in maritime cases as enunciated by this Court in *Kirby* and other cases, and created a direct conflict with the Eleventh Circuit in *Itel Containers v. TITAN SCAN*, 139 F.3d 1450 (11th Cir. 1998), *cert denied*, 525 U.S. 962 (1998), concerning a carrier's alleged waiver of COGSA's limit and the voluntary assumption of a limit greater than that allowed by law. The Sixth Circuit also created a direct conflict with the Eighth Circuit's decision in *Terra Int'l Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 692 (8th Cir. 1997), which held that the *contra proferentem* doctrine does not apply when, as here, the parties are large, sophisticated businesses represented by counsel.

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[1] It has never been questioned that the CP Group is entitled to the benefits available to OOCL in OOCL's bill of lading and other contracts with Ford, and the Sixth Circuit so held. (Pet. App. 39a-40a). Thus, unless specifically distinguished in this Petition, the arguments raised on behalf of OOCL, as the bill of lading issuer, apply equally to the CP Group.

The Sixth Circuit ignored this Court's holding in *Kirby* that bills of lading should be construed like all other contracts. The Sixth Circuit rejected the Eleventh Circuit's holding that, in order for a carrier to waive its statutory limit of liability, the waiver must be clear and unambiguous. Instead, the Sixth Circuit, relying on the inapplicable *contra proferentem* doctrine, construed against Petitioners (not once but twice) what it perceived as ambiguities in OOCL's bill of lading to find that Petitioners had agreed to increase their liability as set forth in Hague-Visby,[2] an international Convention for the carriage of goods by sea to which the United States is not a signatory. It is disturbing that the Sixth Circuit found provisions to be ambiguous when the district court found otherwise (Pet. App. 54a-60a) and when neither Ford nor OOCL argued that the contract was ambiguous, as the Sixth Circuit found. (Pet. App. 24a). It is even more disturbing that a higher than statutory limit is thrust upon the carrier here when the shipper, Ford Motor Company ("Ford"), had the opportunity to declare a higher value for its cargo (requiring the shipper to pay a correspondingly higher freight rate), but Ford declined to exercise that option.

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[2] In 1936, the United States enacted COGSA (current version 46 U.S.C.S. § 30701 *et seq.*), which modified the 1926 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Hague Rules"). The United States did not, however, adopt the later modification of the Hague Rules including the Hague Amendments of 1968 ("Hague-Visby Amendments") or the 1979 Protocol which changed the liability scheme to the International Monetary Fund's Special Drawing Rights ("SDR Protocol"). 2A-II *Benedict on Admiralty*, § 17 (2008).

The Sixth Circuit's holding is one of exceptional, practical and doctrinal importance. The very purpose of COGSA and its $500 per package limit of liability, ubiquitous in the international transportation of goods, is to establish before the carriage commences certainty and uniformity as to the potential rights and liabilities of shippers and carriers. Rather than declaring a higher value for the cargo and paying a higher rate of freight, shippers like Ford almost universally reject the option and elect to insure their cargoes for loss or damage in transit, as Ford did with Royal Insurance Company of America ("Royal") who charged Ford a premium to cover Ford for the full risk beyond the COGSA limit. Royal now wants to undo the limit to which Ford was bound. By ruling in favor of Royal, the Sixth Circuit rejected the reasoning of *Kirby* and the notion of uniformity in maritime cases, created conflict among the circuits, and upset the balance between "risk and reward," giving Royal a windfall for which Ford did not bargain or pay.

Ocean carriers, shippers, consignees and holders in due course of bills of lading, and others involved in the carriage of goods by sea, cannot operate properly without uniformity. Cargo interests need to know what, if any, limit of liability exists prior to a shipment being made. Ocean carriers and their sub-contractors to whom the benefits of COGSA may have been extended need to know the risks they have assumed in agreeing to carry specific cargo. Among other things, carriers set their rates on the basis of the risks they assume. When and how a carrier has "agreed" to accept greater liability than that which is imposed on it as a matter of law is critical to the carrier's planning and operation.

This Court should grant review of the Sixth Circuit's reversal of the district court's decision in order to resolve the conflict of authorities it created and to protect the uniformity required by COGSA[3] and those involved in the carriage of goods by sea.

Factual Background

Ford and OOCL entered into a "Transportation Services Main Agreement" ("TSM") for the worldwide transportation of Ford's auto parts in ocean going containers. In this particular case, the TSM provided for the transportation of auto transmissions in containers by land from the inland city of Blanquefort, France, to the French port of Le Havre. At Le Havre, the containers were to be loaded aboard a vessel for carriage to Montreal, Canada, where they would be discharged and moved by land to numerous cities in the United States. (Pet. App. 3a). The TSM is a negotiated private "service agreement" between Ford and OOCL, which Ford drafted and presented to

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[3] Conflicts on issues of maritime law are particularly problematic because "litigants can easily exploit them through forum shopping." A plaintiff may sue *in rem* wherever a vessel is located or *in personam* wherever process may be served on the defendant or the defendant's property may be attached. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1268 (1989). In the case of container carriers, that involves virtually every state (and circuit) in the country and most countries of the world. Also, Ford understood OOCL's bills of lading limited OOCL's liability and was aware COGSA's $500 package limitation could apply (Pet. App. 93a-98a).

OOCL on a take-it or leave-it basis. (Pet. App. 27a). The TSM is authorized by the enactment of OSRA. Prior to OSRA, carriers could not privately negotiate separate agreements with individual shippers, but rather, had to operate within a regulatory scheme with conference rates and terms approved by and filed with the Federal Maritime Commission. As part of the Ford-drafted TSM, Ford agreed that OOCL's liability for loss or damage to Ford's cargo would be governed by OOCL's standard bill of lading, a copy of which was appended to the TSM. (Pet. App. 20a).

The OOCL bill of lading, like other container carriers' bills of lading, sought to address the multimodal carriage of containers between every possible port and place in the world. It contained many provisions, only a few of which addressed the carrier's liability. (The particular clauses to which the Sixth Circuit referred when it incorrectly determined that an ambiguity existed in the bill of lading are found in Pet. App. 31a, 35a and 38a).

Pursuant to the TSM, in March 2003 Ford delivered to OOCL thousands of auto transmissions which Ford loaded onto racks which in turn were loaded by Ford into numerous forty-foot (40′) containers. The containers were moved inland from Blanquefort, France to Le Havre, France where they were loaded onto the M/V CANMAR PRIDE, a container vessel then owned by CPS No. 5 Limited (and subsequently owned by CPS No. 3 Limited) and bareboat chartered to CP Ships (UK) Limited who in turn slot-chartered space for containers to OOCL. Enroute to Montreal, twenty-six (26) of the containers were lost overboard in a storm. Ford alleges that a total of 4,387 auto transmissions on Ford's racks were lost overboard and 840 transmissions were damaged. Pursuant to its marine insurance policy with Ford, Royal subsequently paid Ford a total of $5,700,299.20. (Pet. App. 3a-4a).

Statutory Background

COGSA "is the central statute in commercial admiralty, governing over $200 billion worth of American foreign commerce annually." Michael F. Sturley, *The Fair Opportunity Requirement under COGSA Section 4(5) (Part I),* 19 J. Mar. L. & Com. 1, 2 (1988). Congress enacted the statute in 1936 "to define by laws the rights and liabilities of water carriers and shippers in foreign commerce." *See Uniform Ocean Bills of Lading – Hague Rules,* H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936). Modeled on the Hague Rules, COGSA prescribes both the rights and responsibilities of common carriers (the companies that own and operate the ocean-going vessels that carry cargo for hire and enter into contracts of carriage with shippers) and the rights and responsibilities of shippers and consignees (the companies that own the cargo shipped on board the carriers' vessels, referred to collectively as "cargo interests"). In enacting COGSA, Congress "sought to allocate risks between carriers and cargo interests under clear, predictable rules that would be simple to apply in commerce." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II),* 19 J. Mar. L. & Com. 157, 161 (1988) *("Part II"); accord, Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959) (detailing history leading up to COGSA and noting that the Hague Rules were intended "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers... in international trade"). COGSA resulted from efforts in the 1920's to bring about uniformity and simplification of bills of lading used in international trade. *Union Ins. Society of Canton v. S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981); *Gamma-10 Plastics, Inc. v. American President Lines*, 32 F.3d 1244 (8th Cir. 1994), *cert. denied*, 513 U.S. 1198 (1994).

COGSA provides that "[t]his Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. ... *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall ... have effect subject to the provisions of this Act." 46 U.S.C.S. § 30701. Sections 2 through 4 of COGSA set forth the duties, rights, liabilities and immunities of the ship and the carrier as "compulsory terms" of the bill of lading. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975). In particular, section 4(5) of COGSA limits the liability of carriers operating in international shipping by providing that "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States." This rule applies "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* Section 4(5) thus protects shippers by setting a floor of $500 per package or unit below which carriers may not reduce their maximum liability, but "cast[s] upon the shipper the burden of declaring the nature and value of goods, and paying a higher tariff, if necessary, if he wishe[s] to impose a higher liability upon the carrier." *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir. 1967), *cert. denied*, 389 U.S. 831 (1967).

Because bills of lading historically had contained various clauses designed to insulate the carrier from any liability for cargo damage, COGSA sought to make bills of lading simple and uniform[4] and to restrict a carrier's ability to avoid liability by inserting limiting conditions in the bill of lading.[5] Toward that end, Section 3(8) of COGSA, specifically invalidates any bill of lading clause that lessens the carrier's liability under COGSA:

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[4] As the House report explained:

> The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading.

Uniform Ocean Bills of Lading – Hague Rules, H.R. Rep. No. 2218, 74th Cong., 2d Sess., 7 (1936).

[5] *See* Note, *Arbitration Clauses; Potential Conflicts With the Carriage of Goods By Sea Act ("Arbitration Clauses")*, 21 Colum. J. Transnat'l L. 157 (1982).

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.

46 U.S.C.S. § 30701.

Procedural Background

On July 2, 2003, Royal and Ford filed suit against OOCL in the United States District Court for the Eastern District of Michigan, seeking to recover the value of lost and damaged transmissions. In its Answer, OOCL asserted the $500 per package COGSA liability limit as an affirmative defense. OOCL subsequently filed a third-party complaint against the CP Group. Royal and Ford moved to strike OOCL's affirmative defense, arguing that the Hague-Visby Rules, not COGSA, applied to the shipment and, therefore, the liability limit was greater than $500 per package.

OOCL and the CP Group moved for partial summary judgment on the applicable liability limit and on the definition of a "package" for limitation purposes, contending that each container or each rack of transmissions, - not each individual transmission-constituted a COGSA package. On September 29, 2005, the district court denied Ford's motion to strike the affirmative defenses and granted in part OOCL's and the CP Group's motions for partial summary judgment, ruling that COGSA applied (thereby limiting liability to $500 per package) and that each rack constituted a package for the purposes of the limitation. (Pet. App. 45a-64a). In so deciding, Judge Hood held, first, that COGSA applied as a matter of law and, second, that COGSA applied as a matter of contract. Judge Hood found that "[t]he Bill of Lading thus clearly contemplates that COGSA may apply even when the carriage is not to, from or through a United States port per se. ... As noted above COGSA applies here because the transmissions were destined for the United States." (Pet. App. 60a). Ford sought, and the district court granted, certification of the liability-limitation and "package" issues for interlocutory appeal. The court of appeals subsequently granted leave to appeal pursuant to 28 U.S.C.S. § 1292(b).

The Sixth Circuit agreed with the district court that COGSA should apply as a matter of law, noting: "Our primary goal is to advance the predictability and uniformity of maritime liability rules, which Congress sought to achieve in 1936 by passing COGSA and which the Supreme Court promoted in its 2004 decision in *Kirby.*" *Royal Ins.*, 525 F.3d at 419 (Pet. App. 17a).

Thereafter, the Sixth Circuit ignored the rationale expressed by this Court in *Kirby,* rejected precedent from the Eleventh Circuit directly on point, and diverted from the principles of uniformity in maritime law. It reversed the district court's specific findings that the bill of lading was unambiguous and did not express an intent by OOCL to agree to a limit of liability in excess of COGSA's $500 per package limit of liability. Instead, finding ambiguity where the district court found clarity, the Sixth Circuit relied on the *contra proferentem* doctrine and found one clause ambiguous, and construed it against OOCL. Then based upon its interpretation of that clause, the Sixth Circuit found an ambiguity in a second clause and also construed that clause against OOCL. These findings are at odds with the parties' own positions since, as the Sixth Circuit noted, "none of the parties have argued that the contract is ambiguous" *Royal Ins.*, 525 F.3d at 422 (Pet. App. 24a). As a result of its unique interpretation, the Sixth Circuit concluded that OOCL agreed to voluntarily increase the limit of its liability from approximately $200,000 to over $5,000,000, without any additional charge for freight. The CP Group was similarly held liable for that same amount under the OOCL bill of lading. (Pet. App. 39a-40a).

In so holding, the Sixth Circuit ignored this Court's directives. "[C]ontracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Kirby*, 543 U.S. at 31. "There is no reason to contravene [a bill of lading] clause's obvious meaning" *Id*. (citing *Green v. Biddle*, 21 U.S. 1, 89-90 (1823) ("Where the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.")). Bills of lading do not require "linguistic specificity" nor should Courts that seek to interpret them subject them to "narrow construction." *Kirby*, 543 U.S. at 22.

The Sixth Circuit failed to comprehend the distinction between (a) attempts by the carrier to expand COGSA's scope to apply either before loading or after discharge by way of a "Clause Paramount"[6] or to expand the scope of the parties entitled to COGSA's liability limitation by way of a "Himalaya Clause"[7] and (b) instances where the carrier voluntarily agrees to increase its liability beyond COGSA's $500 per package limitation, especially, when COGSA applies as a matter of law and not merely as a matter of contract. In the former, "(a)," the carrier is attempting, by way of contract, to expand benefits for itself and its agents or subcontractors beyond what COGSA specifically provides. In the latter, "(b)," the carrier is voluntarily forfeiting its rights and increasing its liability beyond what COGSA provides. How can one ambiguously "voluntarily agree" to increase its liability?

REASONS FOR GRANTING THE PETITION

This Court's review of the decision of the Sixth Circuit is necessary to ensure the proper and uniform resolution of ocean carriers' liabilities in international shipping contracts. In direct conflict with precedents of this Court and the Eighth and Eleventh Circuits, the Sixth Circuit ignored the uniformity objectives in maritime law and hindered the facilitation of efficient contracting for carriage by sea protected by this Court in *Kirby*. The Sixth Circuit's decision disrupts the carefully balanced liability regime set forth in COGSA and will create extraordinary inefficiency in contracting and uncertainty in anticipating, before contracting, the carrier's potential COGSA liability. The Sixth Circuit's decision is the first court of appeals decision to extend COGSA's application, by way of federal common law, to contracts of carriage where, regardless of the intermediary discharge ports, the cargo's ultimate destination is the United States. The principles expressed in that portion of the decision concerning the interpretation of bills of lading are equally applicable to all contracts of carriage where COGSA applies as a matter of law. With the carriage of over 27 million container TEU's shipped to and from the United States each year,[8] this decision, if left to stand, would have a chilling effect on international carriage of goods by sea overall.

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[6] "Clause Paramount" refers to a provision which seeks to extend COGSA's application beyond a ship's "tackles." Schoenbaum, *Admiralty and Maritime Law*, § 10-8, p. 40 (2d ed. 1994).

[7] A "Himalaya Clause" extends the carrier's liability limitations, including COGSA's $500 package limitation, to others. *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 20 n.2 (2004).

The decision is also one of the first reported court of appeals' decisions concerning service contracts and bills of lading since the enactment of OSRA. It brings into question the bases and reasoning expressed in prior cases calling for the application of the *contra proferentem* doctrine in the construction of what some courts previously characterized as contracts of adhesion, and what are now contracts of carriage negotiated fully between two sophisticated parties of equal bargaining power. The Sixth Circuit's holding conflicts directly with that of the Eighth Circuit in the use of the *contra proferentem* doctrine under such circumstances. If permitted to stand, the Sixth Circuit's decision will allow the insurers of cargo owners who agreed to the carrier's liability limitation to obtain a windfall from the carrier that believed itself secure against just such exposure.

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[8] Based on the 2006 U.S. International Oceanborne Containerized Cargo report issued by the World Shipping Council, *available* at: http://www.worldshipping.org/2006_member_lift.pdf. "TEU" refers to a "twenty-foot equivalent unit," a unit of volume used to designate the container capacity of a vessel. *Sea Land Services, Inc. v. United States*, 683 F.2d 491, 495 n.4 (D.C. Cir. 1982).

I. The Sixth Circuit's decision disregards the concepts of uniformity in maritime law and efficiency in contracting for carriage by sea.

Uniformity in maritime law is the cornerstone upon which many of this Court's decisions were founded. This Court in *Kirby* affirmed the broad principle that courts should evaluate multimodal contracts in their entirety rather than treat each of the multiple stages in multimodal transportation as subject to separate legal regimes which would present an obstacle to efficient liability rules. The Sixth Circuit expressly so stated when it held here that the conceptual approach rather that the geographic approach to contracts of carriage governed and it expanded COGSA's *ex proprio vigore* application to ocean carriage between foreign ports where the ultimate destination is the United States. *Royal Ins.*, 525 F.3d at 419. (Pet. App. 16a-19a).

The Court stated: "We think that applying COGSA's liability rules to all carriage of goods by sea, in contracts for transportation with ultimate destinations in the United States, effectuates Congress's intent in a context that Congress never could have predicted: one in which containerized transport and "through" bills of lading prevail." *Id.* at 420. But then the Sixth Circuit went astray abandoning the precepts upon which the *Kirby* decision is based.

The need for uniformity in maritime law is well-known and has been long understood. "Article III's grant of admiralty jurisdiction must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *Kirby*, 543 U.S. at 28, (citing *American Dredging Co. v. Miller*. 510 U.S. 443, 451 (1994), (quoting *The Lottawanna*, 88 U.S. 558 (1875)). Elaborating further, and citing its earlier decision in *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 210 (1996), the *Kirby* Court stated: "[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision." *Kirby*, 543 U.S. at 28 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961)); *see also Pope & Talbot v. Hawn*, 346 U.S. 406, 409 (1953); *Garrett v. Moore-McCormack*, 317 U.S. 239, 248-49 (1942); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959).

Subsequently, in *Kirby*, this Court stated: "Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*, when a '[maritime] contract... may well have been made anywhere in the world,' it should be judged by one law wherever it was made." *Kirby,* 543 U.S. at 29 (quoting *Kossick,* 365 U.S. at 741). The Second Circuit properly noted that the drafters of § 4(5) must have contemplated that a fixed limit on liability applicable in the absence of an agreement setting a higher limit would permit the parties to ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation. *See Standard Electrica, S.A.*, 375 F.2d at 945.

Contrary to the principles espoused in *Kirby*, if left without review, the Sixth Circuit's decision will replace uniformity with uncertainty; and, the Congressional purpose behind the enactment of COGSA, the fundamental goals established by the U.S. Constitution, and efficient contracting in international ocean transportation will be frustrated.

II. The Sixth Circuit's decision is in direct conflict with a decision of the Eleventh Circuit and rejects the underlying rationale of this Court in *Kirby*.

A. When it decided to apply the *contra proferentem* doctrine to OOCL's bill of lading, the Sixth Circuit failed to consider the relevant holding in the Eleventh Circuit's *Titan Scan* decision. In *Titan Scan*, the Court grappled with the same issue as here: Did the parties agree by contract to a liability limit higher than COGSA when COGSA applied by law? The *Titan Scan* court stated:

> U.S. COGSA permits the parties to agree by contract to a higher liability limit. However, the parties' intent to apply the higher limit must be clear; if the question of whether the parties agreed to a higher limit is "irretrievably ambiguous," then COGSA applies by default.

Titan Scan, 139 F.3d at 1453, citing *Valmet Materials Handling Equip., Inc. v. Nedlloyd Lijnen B.V. Rotterdam*, 1993 A.M.C. 1243, 1246 (M.D. Fla. 1993), *aff'd w/o opinion*, 11 F.3d 167 (11th Cir. 1993)). *Titan Scan* has also been cited with approval in *Fireman's Fund Ins. Co. v. Tropical Shipping and Const. Co.*, 254 F.3d 987 (11th Cir. 2001). *Titan Scan,* has been followed in other cases including, most recently, *Acciai Speciali Terni USA, Inc. v. M/V Berane*, 182 F. Supp. 2d 503 (D. Md. 2002), wherein the court quoted the holding in *Titan Scan* recited above and further stated:

> By itself, the standard, boilerplate, "multi-tasking" language of the general paramount clause seems insufficient to demonstrate an agreement by the carrier to accept the Hague-Visby liability limits on shipments to the United States.

Id. at 508. Only *Acciai*, not the Eleventh Circuit's *Titan Scan supra* was cited by the Sixth Circuit for this proposition.

The Sixth Circuit held Petitioners to a new but unreasonable standard. In construing the OOCL bill of lading, the Sixth Circuit concluded: "[W]e believe it appropriate to place the burden on OOCL as the drafter of the bill of lading to explicitly and clearly state its own liability limits." *Royal Ins.*, 525 F.3d at 429. (Pet. App. 39a). By so holding, the Sixth Circuit created a direct conflict with the Eleventh Circuit and rejected all logic or reason where voluntary waivers of statutory rights are concerned.

In their briefs, OOCL and the CP Group referred the Sixth Circuit to *Titan Scan*. But the Sixth Circuit chose to ignore the Eleventh Circuit's reasoning and holding. Rather than applying COGSA's $500 per package limit by default by reason of what it perceived as ambiguities in the bill of lading, the Sixth Circuit instead construed them against OOCL, finding that OOCL, by way of ambiguity, agreed to increase its liability.

The Sixth Circuit referred to cases from other courts of appeals as reason to strictly construe bills of lading. But these cases are inapposite to the case at bar. In one case, a carrier attempted to extend the COGSA "package" to include a massive shipping container. *Monica Textiles v. S.S. TANA*, 952 F.2d 636 (2d Cir. 1991) (Courts should "'take a critical look' at clauses purporting to define the container as the COGSA package ... [as this] would violate the purpose of §4(5) by permitting the carrier to limit its liability unduly" (internal citations omitted). Another case was based upon the conclusion that bills of lading are contracts of adhesion. *Mori Seiki USA, Inc. v M.V. ALLIGATOR TRIUMPH*, 990 F.2d 444 (9th Cir. 1993). Another relied upon the "narrow construction" principle from *Herd* which is now abandoned by *Kirby*. *See SPM Corporation v. M.V. MING MOON*, 965 F.2d 1297 (3d Cir. 1992), which cited *Mitsui & Co. v. American Export Lines*, 636 F.2d 807 (2d Cir. 1981), which, in turn, relied on *Herd* (and also considered whether a 40′ container was a COGSA package). In other cases, issues different from those in the instant matter resulted in the Court's insistence on "clear evidence." *See, e.g., Navieros Oceanikos, S.A. v. S.T. MOBIL TRADER*, 554 F.2d 43 (2d Cir. 1977) (involving an indemnity provision in a fuel supply contract. Indemnity provisions, especially those in which the indemnitee seeks to recover for his own negligence, require that the mutual intention of the parties to this effect appear "with clarity" in the contract. *United States v. Seckinger*, 397 U.S. 203, 212 (1970)).

Other cases cited by the Sixth Circuit involved issues clearly not relevant here. *See Gamma-10 Plastics Inc v. American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994)(timing of shipper's agreement to terms extending COGSA; shipper argued that it did not receive the bill of lading until days after the cargo was delivered); *Vista S.A. v. M/V SEALAND EXPRESS*, 792 F.2d 469 (5th Cir. 1986) (carrier's attempt to extend COGSA's "error in navigation" defense to relieve it from liability for cargo damage caused when a trucker passed under a low highway overpass); and, *Associated Metals & Minerals Corp v. M.V. VISHVA SHOBHA*, 530 F. 2d 714 (6th Cir. 1976) (carrier's efforts to charge shipper with the costs of transshipping cargo from Detroit to Chicago when Chicago was the intended port of discharge).

In no other area of the law can it be said that a party, by way of ambiguity, voluntarily forfeited a statutory benefit afforded that party. In no other industry does such a concept have such a draconian effect. This case exemplifies how a carrier's potential liability can unjustly be increased from less than $250,000 to more than $5,000,000, not due to any increased negligence on its part or by an agreement to increase that liability in exchange for a corresponding increase in the freight rate, but rather because a court mistakenly believes (contrary to the district court) that the single-page, multi-tasking, worldwide bill of lading (drafted so as to ease the contracting for international carriage of goods) can be read to have more than one meaning. The end result makes no sense whatsoever, *i.e.*, an ambiguity in a contract suffices to cause the voluntary "waiver" of the monetary limit of liability provided by a statute enacted by Congress to provide a balanced, uniform liability scheme between cargo interests and carriers. Petitioners submit that a "clear and unambiguous" waiver of the statutory limit of liability, as set forth in *Titan Scan*, is required. In the absence of such a waiver, *e.g.*, where the contract is deemed to be ambiguous, "then COGSA applies by default." *Titan Scan*, 139 F.3d at 1453.

Even if the Sixth Circuit were correct (which Petitioners deny) in finding the contract terms to be ambiguous, it should have remanded the case to the district court for a hearing or trial on the issue of the intent of the parties. The Sixth Circuit faulted the Petitioners for not offering evidence of the intent of the parties, which it acknowledged was relevant only if there was an ambiguity. (Pet. App. 23a-24a). Why would Petitioners, Appellees below, seek to introduce evidence of intent when none of the parties suggested or argued that the contract was ambiguous and the district court, finding no ambiguities, based upon the terms of the contract ruled in favor of Petitioners? By the Sixth Circuit's decision, Petitioners have been unjustly deprived of their right to a hearing on the intent of the parties.

Furthermore, the Sixth Circuit ignored the evidence that Ford understood that OOCL's bills of lading limited OOCL's liability and knew COGSA's $500 package limitation could apply. By failing to remand the case to the district court, the Sixth Circuit rejected its own holding in *B.F. Goodrich Co. v. United States Filter Corp.*, 245 F.3d at 598-99 (on cross motions for summary judgment when conflicting extrinsic evidence of intent exists, the case should be remanded for hearing before the finder of fact).

B. Moreover, the Sixth Circuit's decision rejects the underlying rationale on which *Kirby* is based. This Court recently addressed the issue of bill of lading construction when a carrier attempts to extend COGSA's benefits to third parties. In *Kirby,* the "Questions Presented" in the Brief for Respondents included the following:

> Does a Himalaya clause in a bill of lading using general language mentioning servants, agents, and independent contractors adequately specify a sub-sub contractor with "sufficient clarity" as required by *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959)?

The *Kirby* Respondent argued that strict construction was required, relying principally on *Robert C. Herd, supra.* In that case, this Court first considered whether a carrier's subcontractors were entitled to the benefit of the carrier's limitations and exonerations. In the course of deciding they were, the Court stated:

> [C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.

359 U.S. at 305 (quoting *Boston Metals Co. v. S/S WINDING GULF*, 349 U.S. 122, 123-24 (1955)).

The Respondents in *Kirby* argued that *Herd* required language in a Himalaya Clause with "sufficient clarity" to extend COGSA's benefits to "sub-subcontractors." The Eleventh Circuit in *Kirby* derived "a principle of narrow construction from *Herd*," and the Eleventh Circuit "concluded that the language of the ... bill's Himalaya Clause is too vague to clearly include [the inland carrier] Norfolk." *Kirby*, 543 U.S. at 31. In response, this Court concluded that "nothing in *Herd* requires linguistic specificity ... that the Eleventh Circuit attributes to it. The decision simply says that contracts for carriage of goods by sea must be construed like any other contracts by their terms and consistent with the intent of the parties. If anything, *Herd* stands for the proposition that there is no special rule for Himalaya Clauses." *Id.* at 31.

The Sixth Circuit ignored this portion of *Kirby*. The Sixth Circuit strictly construed the perceived ambiguities in OOCL's bill of lading against the

Petitioners. Not only was *Kirby* ignored, but the underlying basis for the strict construction of the OOCL bill of lading was not present. While *Herd* was interpreted as establishing this principle of narrow construction, even *Herd* limited its application to "contracts purporting to grant immunity from, or limitation of, liability." *Herd*, 359 U.S. at 305. This was *not* the issue before the Sixth Circuit. Petitioners were not seeking to further limit their liability by contract. Rather, the Sixth Circuit, by strictly construing OOCL's bill of lading, held that Petitioners voluntarily increased their liability above the amount stipulated in COGSA. Thus, even the basis for the now defunct principle of strict construction of bills of lading was absent in this case.

Whether or not *Kirby* specifically overruled *Herd* or further explained it or whether the Eleventh Circuit in *Kirby* followed the then "majority rule" is irrelevant. "Although *Kirby* did not address any of the prior lower court decisions (requiring clarity of language) or make any effort to respond to their analysis, the result necessarily overrules the prior majority rule." Michael Sturley, *Norfolk Southern Railway Co. v. James N. Kirby*, Lexis Nexis Expert Commentaries, Research Solutions (April 2006).

Recently, other courts have properly understood and applied *Kirby's* holding. In *Mazda Motors of America v. M/V COUGAR ACE*, Case No. CV 07-62-HV (D. Or. 2007), 2007 U.S. Dist LEXIS 61266 (adopting Magistrate Judge Hubel's findings and recommendations (Pet. App. 71a-86a)), the court addressed the Plaintiff's argument that bills of lading are "contracts of adhesion, usually drafted by the carrier, and are therefore 'strictly construed against the carrier.'" *Id.* at 6 (Pet. App. 76a). The Plaintiff in *Mazda* relied on *Institute of London Underwriters v. Sea–Land Service, Inc.*, 881 F.2d 761, 767 (9th Cir. 1989). The *Mazda* court stated:

> But this rule has recently been rejected by the Supreme Court, which has held that contracts for the carriage of goods are to be construed like other contracts, by their terms and consistent with the intent of the parties, without any particular requirement of strict construction. *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 31 (2004).

Mazda Motors, supra at 6-7 (Pet. App. 76a-77a). The *Mazda Motors* court further elaborated, holding that "the notion that contracts of carriage in general, and Himalaya clauses in particular, are to be strictly construed has been rejected by the Supreme Court." *Id.* at 10 (Pet. App. 80a) (citing *Kirby*, 543 U.S. at 31.).

Neither the reasoning nor the rationale in any of these cases justifies the Sixth Circuit's rejection of *Kirby* or its ignoring *Titan Scan*.

III. Since the enactment of OSRA and the utilization of negotiated service contracts, *contra proferentem* is inapplicable. The application of *contra proferentem* here is in conflict with the Eighth Circuit.

The Sixth Circuit never considered the freedom of contract present here. None of the cases relied upon by the Sixth Circuit for the application of *contra* *proferentem* involved post-OSRA service contracts freely negotiated between two sophisticated parties of equal bargaining power as here.

OSRA dramatically alters the way business is conducted in the container ocean carriage business. The opportunity for shippers and carriers to enter into individual, confidential service contracts is the foundation of the new statute. Shippers no longer have the right to obtain the same essential terms of carriage as similarly situated shippers. Federal Maritime Commission, *The Impact of the Ocean Shipping Reform Act of 1998* (Sept. 2001), *available at*: http://www.fmc.gov/images/pages/ORSA_Study.pdf. Response to the Federal Maritime Commission's Notice of Inquiry on OSRA's impact showed a 200% increase in service contracts filed with the Commission between May 1999 and the time of the study in 2001. In 2001, in certain major trade lanes, service agreements accounted for 80% or more of all container movements in just the first two years of OSRA. Interestingly, the FMC noted an interest on the part of shippers to increase carrier liability for cargo loss and damage beyond that provided in the standard bill of lading. Although in 2001 less than 10% of the contracts sampled contained provisions increasing carrier liability, "both carriers and shippers foresee many of these issues as areas of future contract development over the next five years." *Id.* at 20. "For the most part, OSRA has enabled contracts to be fashioned and consummated in a more market-responsive environment as intended." *Id.* None of the cases cited, and no case found to date, addresses the shipper's and carrier's new rights to negotiate liability limits and their effect on the interpretation of the accepted contract terms.

The *contra proferentem* doctrine simply does not apply and should not have been applied here where the parties possessed equal bargaining power and Ford, the shipper, was a large, sophisticated and experienced shipper. This is especially true where, as here, the parties had the benefit of counsel. *Terra Int'l Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 692 (8th Cir. 1997) ("We decline to apply the doctrine of *contra proferentem* to this case due to the relatively equal bargaining strengths of both parties and the fact that [Appellant] was represented by sophisticated legal counsel during the formation of the agreement"). Other circuit courts of appeals have similarly held. *See Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1116 n.33 (1st Cir. 1994) (applying Maryland law); *see also B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587 (6th Cir. 2001) (applying New York law); *see further Porous Media Corp. v. Midland Brake, Inc.*, 220 F.3d 954 (8th Cir. 2000) (applying Minnesota law).

Moreover, application of the *contra proferentem* doctrine against the CP Group is particularly vexing because they were not involved in the drafting of the bill of lading. *See Transatlantic Marine Claims Agency, Inc. v. M/V OOCL Inspiration, et al*, 137 F.3d 94, 104 n.20 (2d Cir. 1998) ("[i]nvoking the interpretive doctrine of *contra proferentem*... would, however, be unusually problematic in this case because it would negatively affect not just OOCL, the drafter of the bill, but also Sea-Land, who was not involved in the drafting in any way at all").

The result is a patchwork of conflicting authority at a time when post-OSRA cases are being brought before the various district courts. While such a lack of uniformity may be tolerable in other industries, the typical maritime transaction subject to COGSA involves many different domestic jurisdictions, in various circuits, any one of which could be the forum for a lawsuit. For example, Ford is a Delaware corporation with its principal place of business in Michigan and facilities around the country. The twenty-six containers in question were destined for delivery in four different states. Here, as in most COGSA cases, there may be a range of possible venues, each potentially with its own approach to bill of lading construction.

Ocean carriers should not have to speculate whether the COGSA limit of liability will be enforced, or whether they purportedly "agreed," *via* strict construction of a perceived ambiguity, to voluntarily increase their liability pursuant to an otherwise inapplicable Convention to which the United States is not a signatory. Rather, as this Court explained in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), "federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" Indeed, it was the very purpose of COGSA to take the guesswork out of bills of lading on the premise that promoting "[t]he uniformity and simplification of bills of lading [would] be of immense value to the shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities." *Uniform Ocean Bills of Lading – Hague Rules*, H.R. Rep. No.

2218, 74th Cong., 2d Sess. 7 (1936). The conflict between the Sixth Circuit on the one hand and the Eighth and Eleventh Circuits on the other frustrates that congressional purpose. Further review is warranted.

IV. The Sixth Circuit decision is wrong.

Rather than relying on the principal rule of contract construction that gives meaning to all terms of the contract consistent with one another, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Sixth Circuit fell back on the *contra proferentem* doctrine, a rule that is "hard to distinguish from a denial of effect to an unconscionable clause." Restatement (Second) of Contracts, § 206 cmt. a (1981).[9] The Sixth Circuit incorrectly concluded that carriage "to or from the United States," as used in OOCL's bill of lading Clause 4(C), reasonably could be interpreted to mean carriage to the United States "by sea" only, as well as carriage to the U.S. "by any mode," as OOCL urged. Thus, according to the court, the clause was ambiguous. The Sixth Circuit's interpretation, however, is not reasonable and the clause is not ambiguous. A finding of ambiguity requires two or more "reasonable" interpretations. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 148 (2d Cir. 1993). In addition to adding nonexistent words to Clause 4(C), the Court's interpretation makes the phrase used later in Clause 4, carriage "to, from or through a port in the United States," superfluous. This additional descriptive language in Clause 4(D)(1) has no meaning if the Sixth Circuit's interpretation of "to or from the United States" is synonymous with "by sea," or "to, from or through a port in the United States." Such an interpretation violates U.S. Supreme Court precedent, including *Mastrobuono, supra*, and the many cases that follow it.

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[9] As previously noted, the district court did not find the terms of the bill of lading ambiguous. Rather, it stated that "... the Bill of Lading presently at issue can only be read harmoniously if COGSA is held to apply" (Pet. App. 58a). Likewise, as the Sixth Circuit noted, the parties themselves agreed that the contract was not ambiguous and relied on the plain language of the contract. (Pet. App. 24a). It is only the Sixth Circuit that erroneously proclaims ambiguity. In order to reach its conclusion and change the clear meaning of the contract, the court had to, and in fact did, engage in an unnecessary, incorrect and tortuously strained analysis.

Reading Clause 4(C) broadly and consistently, as Petitioners asked, with Clause 4(D)(1), giving meaning to all terms of the contract, Clause 4(C) provides that in the case of carriage to/from the United States by any means COGSA applies. Clause 4(C) would then be read, without conflict or ambiguity, with the other provisions of Clause 4. However, even if the contract is construed to hold that both COGSA and Hague-Visby apply simultaneously, United States courts apply COGSA by default. *Farrell Lines, Inc. v. Colombus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997), *aff'd sub nom., Farrell Lines, Inc. v. Ceres Terminals, Inc.*, 116 F.3d 115 (2d Cir. 1998); *Ferrostaal v. M/V SEA PHOENIX*, 447 F. 3d 349 (3d Cir. 2006); *see also* Grant Gilmore and Charles Black, Jr., *The Law of Admiralty* §3-19 at 130 (2d ed. 1975) and 2A-V *Benedict on Admiralty*, § 41 (2008).

When COGSA applies as a matter of law, as is the case here, Clause 4(D)(1) extends COGSA to govern the period before loading and after discharge from the vessel, just as the Sixth Circuit held. Although the court of appeals misconstrued Clause 4(C), its later interpretation of Clause 4(D)(1) is not inconsistent with the proper interpretation of 4(C), but Clause 4(D)(1) remains inapplicable to this case since the loss occurred during the ocean transport.

When Clause 4(C) is properly construed, Clause 4(D)(4) can be clearly and completely understood without resorting to the *contra proferentem* doctrine. Clause 4(D)(4) provides for the application of COGSA's $500 package limitation when COGSA does not apply as a matter of law, even when some other body of law applies, unless that other body of law provides a limitation more favorable to OOCL. *See, e.g., Hartford Fire Ins. Co. v. Orient Overseas Container Line*, 230 F.3d 549 (2d Cir. 2000). This correct interpretation causes no conflict with any other provision. If COGSA applies as a matter of law, Clause 4(C) limits OOCL's liability to $500 per package. If COGSA does not apply as a matter of law, then, pursuant to Clause 4(D)(4), COGSA's limitation of liability applies unless another, more favorable, limitation applies. Further, Clause 4(D)(4) evidences OOCL's clear "intent" to apply the lowest liability limitation available whenever possible. There can be no reasonable explanation why OOCL on the one hand would be so determined to limit its liability to COGSA when COGSA *does not* apply by law (Clause 4(D)(4)), but on the other hand would voluntarily increase its limitation of liability above that in COGSA when COGSA *does* apply, as the Sixth Circuit concluded.

Reading the contract as a whole, giving all of its terms meaning, allows for the following consistent and non-contradictory interpretation:

1. Under Clause 4(C), COGSA always applies whenever carriage (by any means) is to or from the United States. If not to or from the United States, then either Hague or Hague-Visby, if compulsorily applicable, applies. If no such Convention is compulsorily applicable, then the Hague Rules apply.

2. Under Clause 4(D)(1), if COGSA applies as a matter of law, then it is extended to cover the period before loading and after discharge.

3. Under Clause 4(D)(4), if COGSA does not apply as a matter of law, then its $500 per package limitation of liability will apply in any event unless some other applicable body of law provides a lesser liability limit in favor of OOCL.

These are the only reasonable interpretations (consistent with "Notice 1" on the face page of all the issued bills of lading, advising of the applicability of COGSA's $500 limitation) and avoid the use of the "venerable, but feeble" doctrine of *contra proferentem*. *Acciai,* 182 F. Supp. 2d at 508 n.7.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-1199

[Filed May 8, 2008]

ROYAL INSURANCE COMPANY OF)
AMERICA; FORD MOTOR COMPANY,)
Plaintiffs-Appellants,)
)
v.)
)
ORIENT OVERSEAS CONTAINER)
LINE LTD.,)
Defendant-Appellee,)
)
v.)
)
M/V "Canmar Pride," CP Ships (UK) Ltd.,)
CPS No. 3 Ltd., and CPS No. 5 Ltd.,)
Third-Party Defendants-Appellees.)
)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 03-72574 — Denise Page Hood, District Judge.

Argued: Jan. 23, 2007

Decided and Filed: May 8, 2008

COUNSEL

ARGUED: James F. Sweeney, Nicoletti, Horing, Campise & Sweeny, New York, New York, for Appellants. Thomas L. Tisdale, Tisdale & Lennon, Southport, Connecticut, Philip G. Meyer, Farmington Hills, Michigan, for Appellees. **ON BRIEF:** James F. Sweeney, Nicoletti, Horing, Campise & Sweeny, New York, New York, for Appellants. Thomas L. Tisdale, Tisdale & Lennon, Southport, Connecticut, Philip G. Meyer, Farmington Hills, Michigan, for Appellees.

Before: BOGGS, Chief Judge; MERRITT and MOORE, Circuit Judges.

AMENDED OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiffs-Appellants Ford Motor Co. ("Ford") and its cargo insurer, Royal Insurance Co. of America ("Royal") (collectively, "Appellants"), brought this action against Defendant-Appellee Orient Overseas Container Line Ltd. ("OOCL," or "Appellee"), an ocean carrier, for damages arising from the loss of cargo during a transatlantic voyage. OOCL impleaded Third-Party Defendants-Appellees M/V Canmar Pride, the carrying vessel; CP Ships (UK) Ltd.; CPS No. 3 Ltd.; and CPS No. 5 Ltd. (collectively, "Third-Party Appellees"). On September 29, 2005, the district court granted partial summary judgment for OOCL and Third-Party Appellees, ruling that Appellants' claims were subject to the $500-per-package liability limitation prescribed by the Carriage of Goods by Sea

Act ("COGSA"), 46 U.S.C. § 30701 et seq. Both the district court and this court authorized an interlocutory appeal of that ruling, and Appellants now argue that the district court's ruling should be reversed. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** this case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

In February 2003, Ford and OOCL entered into a "Transportation Services Main Agreement" ("TSM") for the multimodal transport of Ford's auto-transmission racks from Blanquefort, France to various cities in the United States. The TSM provided for transportation of the goods by land from the inland city of Blanquefort to the French port of Le Havre; by sea to Montreal, Canada; and by land to inland cities in the United States including Louisville, Kentucky; Hazelwood, Missouri; New Hope, Minnesota; and Westland, Michigan. Pursuant to the TSM, in March 2003, Ford delivered to OOCL thousands of auto transmissions held in racks within containers. OOCL loaded the cargoes on board CP Ships' M/V Canmar Pride at the port of Le Havre. OOCL issued bills of lading for the cargoes, showing Blanquefort as the "Place of Receipt," Le Havre as the "Port of Loading," Montreal as the "Port of Discharge," and multiple inland cities in the United States as the "Place of Delivery."

During the voyage, the vessel encountered stormy weather that washed some of the containers overboard and flooded others, damaging their contents. Appellants allege that the storm resulted in the loss of 4,387 auto transmissions and damaged 840 transmission units. Royal subsequently reimbursed Ford for the lost and damaged transmissions, pursuant to Ford's marine-insurance policy, in the amount of $5,700,299.20.

B. Legal Background

In 1936, the United States enacted COGSA, 49 Stat. 1207 (1936) (current version at 46 U.S.C. §§ 30701 et seq.), which codified the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("the Hague Rules"). COGSA applies to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea *to or from ports of the United States,* in foreign trade...." 46 U.S.C. § 30701 (emphasis added). The majority of the United States' trading partners later adopted the Hague-Visby Amendments of 1968 ("the Hague-Visby Rules"), which modified several provisions of the Hague Rules. Several of these countries also adopted a 1979 Protocol, which changed the Hague-Visby Rules from the gold standard to a limitation system based on the International Monetary Fund's Special Drawing Rights. The United States, however, has declined to adopt either the 1968 or the 1979 amendments and has chosen to retain COGSA's enactment of the Hague Rules. Michael F. Sturley, 2A *Benedict on Admiralty* § 17 (4th ed. 2004).

C. Procedural Background

On July 2, 2003, Ford and Royal filed suit against OOCL in the United States District Court for the Eastern District of Michigan, seeking to recover the value of the lost and damaged transmissions. In its Answer, OOCL asserted the $500-per-package COGSA liability limitation as an affirmative defense. OOCL subsequently filed a third-party complaint against Third-Party Appellees. Ford and Royal moved to strike OOCL's affirmative defense, arguing that the Hague-Visby Rules, not COGSA, applied to the shipment and, therefore, that the liability limit was greater than $500 per package.

OOCL and Third-Party Appellees moved for partial summary judgment on the applicable liability limitation and on the definition of a "package" for limitation purposes, arguing that each rack of transmissions, and not each individual transmission, constituted a COGSA package. On September 29, 2005, the district court denied Appellants' motion to strike and granted in part[1] OOCL's and Third-Party Appellees' motions for partial summary judgment, ruling that COGSA applied (thereby limiting liability to $500 per package) and that each rack constituted a package for the purposes of the limitation.

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[1] OOCL's and Third-Party Appellees' motions also sought summary judgment regarding whether all of the transmissions alleged to have been damaged actually were damaged, but the district court declined to decide that issue.

Ford and Royal sought, and the district court granted, certification of the liability-limitation and "package" issues for interlocutory appeal. We subsequently granted leave to appeal pursuant to 28 U.S.C. § 1292(b), and Appellants now seek reversal of the district court's ruling.

II. ANALYSIS

This case requires us to consider, first, whether COGSA or the Hague-Visby Rules or both apply as a matter of law to the ocean voyage between Le Havri, France and Montreal, Canada. Second, having determined which law applies *ex proprio vigore,*[2] we must examine a complex bill of lading to determine whether Ford and OOCL contracted for the liability limits set forth in COGSA or in the Hague Visby Rules. The case presents an intellectual puzzle that we must resolve without direct precedent as guidance, and our analysis should be understood as a default rule around which cargo owners and carriers can contract.

After considering relevant caselaw as well as principles of admiralty law, we reach the conclusion that the Hague-Visby Rules apply *ex proprio vigore* to the ocean carriage in question, between Le Havre and Montreal. We also conclude that COGSA does not apply *ex proprio vigore* to an ocean voyage between two foreign ports, even though the ultimate destination of a through bill of lading may be a city in the United

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[2] The term *ex proprio vigore* means "[b]y their or its own force." *Black's Law Dictionary* 612 (8th ed. 2004).

States. But that does not end our inquiry. The Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004), affirmed the broad principle that courts should evaluate multimodal contracts in their entirety rather than treat each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would present an obstacle to efficient liability rules. We therefore hold today that as a matter of federal common law COGSA liability rules apply to a multimodal maritime contract with an ultimate destination in the United States, regardless of whether the contract provides for an intermediary stop en route during the sea stage of transport or between the sea and land legs. The parties in this case, however, were free to contract for application of the liability limits set forth in either the HagueVisby Rules or COGSA. The convoluted and contradictory nature of the contract at issue has led us to apply the doctrine of *contra proferentem* and to construe the bill of lading against its drafter, OOCL. We hold that OOCL and Ford contracted for application of the liability limits set forth in the Hague-Visby Rules.

A. Subject-Matter Jurisdiction

The district court had subject-matter jurisdiction over this admiralty case pursuant to 28 U.S.C. § 1333. Pursuant to 28 U.S.C. § 1292(b), this court has jurisdiction over the appeal taken from an Order of the United States District Court for the Eastern District of Michigan, entered on September 29, 2005.

B. Standard of Review

We review the district court's order granting summary judgment de novo. *DiCarlo v. Potter,* 358 F.3d 408, 414 (6th Cir. 2004). "Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law." *Macy v. Hopkins County Sch. Bd.,* 484 F.3d 357, 363 (6th Cir. 2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Fed.R.Civ.P. 56(c). We must ascertain "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Bryson v. Regis Corp.,* 498 F.3d 561, 569 (6th Cir. 2007) (citing *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Regardless of the evidence put forth by the nonmoving party, the moving party has the burden of establishing that "there is an absence of evidence to support the nonmoving party's case." *Patmon v. Mich. Supreme Ct.,* 224 F.3d 504, 508 (6th Cir. 2000) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Although Appellants as well as Appellee and Third-Party Appellees in this case made cross-motions for summary judgment before the district court, Ford and Royal now appeal the grant of partial summary judgment to OOCL and Third-Party Appellees. Thus, this court must view OOCL and Third-Party Appellees as the moving parties and Ford and Royal as the nonmoving parties.

C. Law Applicable to Ocean Carriage from Le Havre, France to Montreal, Canada

Numerous commentators have noted that the advent of containerization and the accompanying rise of multimodal "through" bills of lading issued by ocean carriers have complicated the legal liability regimes governing shippers' claims. Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem,* 79 Tul. L.Rev. 1461 (2005). Our decision in the case before us is especially difficult because there exists little direct precedent on the issue and the lower federal court cases cited by each side, for reasons elaborated below, are neither binding on this court nor persuasive.

1. Hague-Visby Rules

The Hague-Visby Rules compulsorily apply by their own terms to the carriage of goods by sea from Le Havre to Montreal. The Visby amendments to the Hague Rules specified that they apply to bills of lading for the carriage of goods between ports in two different States (i.e., countries) if:

> (a) the bill of lading is issued in a Contracting State, or
>
> (b) the carriage is from a port in a Contracting State, or
>
> (c) the Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving

> effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Art. 5, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977), reprinted in 3 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 862-63 (4th ed.2004) [hereinafter the Hague-Visby Rules]. France is a signatory to the Hague-Visby Rules. George F. Chandler III, *A Comparison of "COGSA", the Hague/Visby Rules, and the Hamburg Rules,* 15 J. Mar. L. & Com. 233, 289 (1984). Accordingly, the Hague-Visby Rules apply *ex proprio vigore* to the voyage because the carriage was from a port, Le Havre, in the contracting state of France.

2. COGSA

Our decision regarding whether COGSA applies by its own terms to the ocean carriage from Le Havre, France to Montreal, Canada turns on whether we read COGSA according to the plain language of the statute or according to an "ultimate destination" theory. COGSA applies to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea *to or from ports of the United States,* in foreign trade...." 46 U.S.C. § 30701 (emphasis added). "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 30701(1)(e). "The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries." 46 U.S.C. § 30701(13). Ford and Royal argue that COGSA did not apply as a matter of law to the carriage of goods between Le Havre and Montreal because neither are ports of the United States. In contrast, OOCL argues that COGSA should apply *ex proprio vigore* because although Montreal served as the point of discharge, the ultimate destination of the cargo was cities in the United States.

Ford and Royal argue that settled admiralty law recognizes that COGSA applies by its own terms during the "tackle-to-tackle" period in the carriage of goods between foreign and U.S. ports. Indeed, we agree that to hold that COGSA applied *by its own terms* to the ocean voyage between Le Havre and Montreal would contradict the plain language of the statute. *See, e.g., Foster Wheeler Energy Corp. v. An Ning Jiang MV*, 383 F.3d 349, 355 (5th Cir. 2004) (holding that "COGSA only applies compulsorily during the tackle-to-tackle period to contracts for the carriage of goods to or from U.S. ports in foreign trade"); *Schramm, Inc. v. Shipco Transp., Inc.*, 364 F.3d 560, 565 (4th Cir. 2004) (holding that "a discharge of goods occurs under COGSA when the goods are removed from the ship at the final port of destination"); *Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing*, 167 F.3d 99, 100-101 (2d Cir. 1999) (holding that COGSA applies because cargo was shipped from Japan to the United States); *Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co.*, 559 F.2d 1173, 1177 n. 5 (9th Cir. 1977) (observing that "COGSA has been continuously interpreted as being applicable from the time the ship's tackle is hooked onto the cargo at the port of loading until the time when cargo is released from the tackle at the port of discharge"); *Firestone Tire & Rubber Co. v. Almacenes Miramar, Inc.*, 452 F.Supp. 670, 671 (D.P.R. 1978) (holding that "COGSA applies only to goods in shipment between the United States and a foreign port ... and only while the goods are on board ship").

The district court opinion as well as the briefs for OOCL and Third-Party Appellees rely heavily on an unpublished case issued by the United States District Court for the Western District of Washington. *Tarnawski v. Schenker, Inc.*, No. C02-5659FDB, 2003 WL 22721987, at *3 (W.D.Wash. May 6, 2003) (unpublished opinion), held that COGSA applied as a matter of law to the carriage of goods from Hamburg, Germany to Montreal, Canada as part of a shipment originating in Poland with the ultimate destination of Seattle, Washington. The *Tarnawski* opinion provided little explanation as to why an ultimate-destination theory rather than the plain language of the statute should apply, except for citing another case decided by the United States District Court for the Central District of California. *Joe Boxer Corp. v. Fritz Transp. Int'l,* 33 F.Supp.2d 851, 855 (C.D.Cal. 1998), held that COGSA did not apply as a matter of law to a contract for the carriage of goods from China to Guatemala via Long Beach, California. *Joe Boxer,* in turn, relied on *People's Insurance Co. of China v. M/V Damodar Tanabe (In re Damodar Bulk Carriers, Ltd.),* 903 F.2d 675, 680 (9th Cir. 1990), which held that a distress discharge in Hawaii during a shipment of goods between ports in Chile and China was insufficient to invoke COGSA *ex proprio vigore.* On their own, these cases are not enough to persuade us to adopt an ultimate-destination theory. *Joe Boxer* and *Damodar* involved goods shipped by sea to and from foreign ports, with intermediary stops at U.S. ports. Here, goods are similarly shipped between foreign ports. But although U.S. cities were the ultimate destination of Ford's auto transmissions, the contract provided for the transmissions to be carried there over land and not by sea. In the present case, the ocean voyage did not extend from France to a United States port with an intermediary stop in Montreal; rather, the ocean voyage ended in Montreal. There is nothing in the *Damodar* or *Joe Boxer* opinions alone to persuade us to hold that a port of discharge-the last stage of a shipment by sea-belongs in the category of mere intermediary stops signaling no change in applicable maritime law.

The other lower court cases upon which OOCL and Third-Party Appellees rely are also unpersuasive. *Hartford Fire Insurance Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549 (2d Cir. 2000), concerned a multimodal transportation contract pursuant to which cargo was trucked from Wisconsin to Chicago, moved by rail to Montreal, shipped to Belgium, and then discharged to a participating carrier who had the responsibility of trucking the cargo to the Netherlands. Thieves stole the cargo during this last stage of the transport. The Second Circuit held that the parties had not extended COGSA by contract to the transport of the cargo by land from Belgium to the Netherlands.[3] *Id.* at 558-59. In support of an ultimate-destination theory, OOCL points to footnote 10 of the Second Circuit opinion, stating that if the "dispute had involved the seagoing portion of the transport, COGSA would apply *ex proprio vigore* ...." *Id.* at 557 n. 10. But this footnote is merely dicta and, furthermore, may contradict other dicta in the opinion suggesting that COGSA would have applied to the ocean carriage only by contract and not *ex proprio vigore. See id.* at 557 n. 9.

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[3] The contract in *Hartford* provided for the application of COGSA only in the absence of a different law directly applicable to that

OOCL also cites in support of its ultimate-destination theory *Gerling-Konzern v. Expeditors International Ocean,* No. 99 C 8348, 2000 WL 781434 (N.D.Ill. June 15, 2000) (unpublished opinion). The United States District Court for the Northern District of Illinois held that a carrier's bill of lading did not extend its liability under COGSA to the periods before the goods were loaded on the vessel and after the goods were discharged, during which COGSA did not apply *ex proprio vigore. Id.* at *3. OOCL incorrectly states that *Gerling-Konzern* held that COGSA applied to the carriage of goods by sea between Genoa, Italy and Montreal, Canada. Instead, *Gerling-Konzern* did not definitively decide this question and merely observed "that whatever liability [the defendant] *may have* under COGSA as a carrier *would* only arise during the period of ocean transport." *Id.* at *4 (emphases added).

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stage of the transport and, in fact, another law applied: the Convention on the Contract for the International Carriage of Goods by Road.

OOCL and Third-Party Appellees lastly argue that the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby* requires us to interpret COGSA according to an ultimate-destination theory. In *Kirby,* the Supreme Court held that admiralty jurisdiction extends to a contract dispute when the "contract is a maritime one, and the dispute is not inherently local." *Kirby,* 543 U.S. at 22-23, 125 S.Ct. 385. The Court concluded that a contract for multimodal transportation involving both sea and land carriage retains its maritime character. "[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce-and thus it is a maritime contract." *Id.* at 27, 125 S.Ct. 385. In so holding, the Supreme Court rejected a spatial interpretation of maritime contracts in favor of a conceptual one. *Id.* at 24, 125 S.Ct. 385.

OOCL argues that the conceptual approach to admiralty taken by the Supreme Court in *Kirby* suggests that COGSA applies as a matter of law whenever the ultimate destination of a shipping contract is located in the United States. Appellants correctly note, however, that *Kirby* addressed the question of subject-matter jurisdiction rather than COGSA's applicability as a matter of law to spatial or temporal realms beyond the plain language of the statute. *Kirby*'s holding of admiralty jurisdiction over a dispute involving the land leg of a multimodal transportation contract does not directly resolve the question of which maritime law applies in the present case. *Kirby* extended only admiralty jurisdiction to the inland leg and not COGSA, itself, as a matter of substantive law. Crowley, *The Limited Scope of the Cargo Liability Regime,* 79 Tul. L.Rev. at 1495 (citing

Kirby, 543 U.S. at 36, 125 S.Ct. 385). Thus, *Kirby* did not suggest that a conceptual approach to admiralty means that COGSA now applies *ex proprio vigore* to an ocean voyage between two foreign ports, if the ultimate destination of a through bill of lading is a city in the United States.

3. Federal Common Law

Ninety years ago, the Supreme Court concluded that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country" and that "in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law." *Southern Pac. R.R. Co. v. Jensen,* 244 U.S. 205, 215, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). Thus, in the absence of a federal statute, courts may apply federal common law. *Sompo Japan Ins. Co. v. Union Pac. R.R. Co.,* 456 F.3d 54, 74 (2d Cir. 2006) (citing *E. River S.S. Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 864, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)). "What constitutes a relevant federal statute is determined solely by whether a given statute applies by its own terms to a particular set of facts." *Id.* Because neither COGSA nor any other United States federal statute applies by its own terms to the ocean voyage between Le Havre and Montreal, we must apply federal common law to decide the case. Other courts have applied the Hague-Visby Rules where they apply as a matter of law and where COGSA does not apply *ex proprio vigore. See An Ning Jiang,* 383 F.3d at 354-55 (finding that a cargo owner and carrier had contracted to invoke COGSA liability limitations "only during periods and for claims not governed by the

Hague-Visby Rules" and that Hague-Visby, and not COGSA, applied *ex proprio vigore* to the carriage of goods from Spain to China); *Craddock Int'l Inc. v. W.K.P. Wilson & Son, Inc.,* 116 F.3d 1095, 1107 (5th Cir. 1997) (holding that the Hague-Visby Rules and not COGSA applied as a matter of law to the transport of cargo from Venezuela to Peru); *In re Damodar,* 903 F.2d at 680 (holding that "a distress discharge is insufficient to invoke COGSA *ex proprio vigore*" with respect to a contract for ocean transportation from Chile to China). None of these cases, however, involved a contract for the carriage of goods that had an originating point or ultimate destination in the United States. Accordingly, they do not persuade us to apply the HagueVisby Rules as a matter of federal common law in the instant case.

Our primary goal is to advance the predictability and uniformity of maritime liability rules, which Congress sought to achieve in 1936 by passing COGSA and which the Supreme Court promoted in its 2004 decision in *Kirby*. *Kirby*'s reasoning affirms the broader principle that courts should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would be an obstacle to uniform and efficient liability rules. The Court explained that the new technology of containerization had popularized "through" bills of lading, by which cargo owners entered into a single contract for multiple stages of transportation across oceans and to inland destinations. By extending admiralty jurisdiction, the Court intended to promote cargo owners' "efficient choice" to arrange for multimodal transport via a single bill of lading. *Kirby,* 543 U.S. at 25-26, 125 S.Ct. 385. Although COGSA does not apply by its own terms to the carriage of goods by sea between two foreign ports, extending COGSA's applicability to such a voyage when the ultimate destination of a through bill of lading is in the United States will promote efficient contracting between cargo owners and shippers. When the shipment of cargo has a point of delivery in the United States, we would render contracts unpredictable if we made liability rules depend upon the location of the port of discharge, which varies according to the changing needs of the carrier. Ford admits in the instant case that the decision whether to route ships via Montreal or Norfolk, Virginia is one made by OOCL; Ford cares only that OOCL offers a competitive price and delivers the goods in time. Joint Appendix ("J.A.") (Dunn Dep. at 65-66). It would only further confuse the already complex law governing multimodal contract rules if a mid-voyage decision by a carrier to reroute a ship destined for Norfolk through Montreal-because of bad weather or a problem with the port service-triggered different liability limits.

Kirby suggests that we should not use the particularized geography of cargo's transport across various oceans, railways, and highways to determine the applicable maritime law. In today's shipping industry, goods are commonly discharged at a port outside the United States and subsequently moved by truck or rail into this country. If Montreal served as an intermediary refueling stop on a shipping route between Le Havre and New York City, that stop would not lead us to apply the Hague-Visby Rules rather than COGSA as a matter of law. *See Joe Boxer,* 33 F.Supp.2d at 855; *In re Damodar,* 903 F.2d at 680.

The question now becomes whether, if the stop in Montreal marks the end of the shipping stage and the beginning of the land stage of transport, that fact should trigger the application of the Hague-Visby Rules rather than COGSA as a matter of law. To begin, we observe that making the liability rule dependent on the mode of transport subsequent to the stop in Montreal does not promote legal predictability and efficient contracting. Furthermore, *Kirby*'s extension of both admiralty jurisdiction and federal maritime law to the land portions of multimodal contracts encourages us to recognize that "the shore is now an artificial place to draw a line." *Kirby,* 543 U.S. at 25, 125 S.Ct. 385. *Kirby* causes us to read *Damodar* and *Joe Boxer* in a new light. We hold today that an intermediary stop en route pursuant to a multimodal maritime contract with an ultimate destination in the United States, regardless of whether the stop is during the sea stage of transport or between the sea and land legs, should not prevent the application of COGSA liability rules as a matter of federal common law. Our decision effectuates Congress's intent when it passed COGSA in 1936 to promote uniformity in shipping. We think that applying COGSA's liability rules to all carriage of goods by sea, in contracts for transportation with ultimate destinations in the United States, effectuates Congress's intent in a context that Congress could never have predicted: one in which containerized transport and "through" bills of lading prevail.

D. The Bill of Lading and Liability Limitations

1. Choice of Law

As an initial matter, we must evaluate the choice of law under which we will examine the terms of the bill of lading. The TSM consists of Ford's Global Terms and Conditions and Ford's Supplemental Ocean Transportation Terms. J.A. at 859 (TSM). Clause 10 of Ford's Supplemental Terms, in turn, provides that OOCL's bill of lading governs OOCL's liability for loss or damage to Ford's commodities. J.A. at 861(TSM). We first turn to Ford's Global Terms and Conditions. Clause 26(a) of those terms provides that: "[a] Purchase Order shall be governed by the law of Buyer's principal place of business *without regard to conflict of laws provisions thereof*, and litigation on contractual causes arising from a Purchase Order shall be brought only in that jurisdiction." J.A. at 881(TSM). Thus, Clause 26(a) suggests that we interpret the bill of lading according to the substantive law of Michigan.

The bill of lading, too, contains a choice-of-law provision. Appellants argue that the first paragraph of Clause 30 of the bill of lading applies in the instant case. That paragraph states: "the rights and obligations of all parties concerned in connection with the carriage of the Goods hereunder shall be governed by and construed in accordance with English law." J.A. at 85 (Bill of Lading at 8). However, the second paragraph of Clause 30 states that when COGSA "shall for any reason whatsoever apply compulsorily to the carriage of the Goods hereunder then this Bill of Lading, the contract contained in and/or evidenced hereby, and the rights and obligations of all parties concerned ... shall be governed by and construed in accordance with United States law." *Id.* Because we have determined that COGSA applies as a matter of federal common law, the second paragraph of Clause 30 controls, which suggests that we should evaluate the terms of the bill of lading in accordance with United States law.

Accordingly, a conflict exists between Clause 26 of Ford's Global Terms, directing us to apply Michigan substantive law, and Clause 30 of OOCL's bill of lading, directing us to apply federal law. Well-founded principles of contract law establish that "specific terms and exact terms are given greater weight than general language" and that "separately negotiated or added terms are given greater weight than standardized terms...." *Restatement (Second) of Contracts* § 203 (1981). Following these principles, we give greater weight to Clause 30 of the bill of lading because it is the choice-of-law clause specific to the agreement for the carriage of goods negotiated between OOCL and Ford. Clause 26, by contrast, represents general, standardized language applicable to all of Ford's contracts for production parts and non-production goods and services. In conclusion, we apply United States law in interpreting the contract, which we held above as a matter of federal common law to be COGSA.[4]

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[4] We note that as a practical matter it makes no difference to the case whether we apply Michigan's rules of contract interpretation or the rules established by federal common law because they are substantially similar as applied to the issues raised by this case.

COGSA allows parties to contract for higher liability limitations than the $500 per package limitation provided by the statute. 46 U.S.C. § 30701(4)(5). We thus evaluate the bill of lading to determine whether the parties contracted for the higher liability limits provided by the Hague-Visby Rules. In so interpreting the bill of lading, we look both to the federal maritime law of contracts as well as to general principles of contract interpretation. *See Maru Shipping Co. v. Burmeister & Wain Am. Corp.*, 528 F.Supp. 210, 214 (S.D.N.Y. 1981) (holding that "[w]he[n] the federal law of the sea provides ... no clear precedent ..., [the court] may look to the prevailing law of the land as applied by the states.") To ascertain these principles of contract interpretation, we look to this and other circuits' application of both federal-common-law principles and state law.

2. Standard for Review of the Bill of Lading

We consider as a threshold matter whether a judge or jury should resolve contract disputes. "The proper interpretation of a contract is a question of law." *JPMorgan Chase Bank, N.A. v. Winget,* 510 F.3d 577, 582 (6th Cir. 2007) (applying Michigan law) (quoting *Archambo v. Lawyers Title Ins. Corp.*, 466 Mich. 402, 646 N.W.2d 170, 174 (Mich. 2002)). Questions of contract interpretation, including those that form the basis for the grant of summary judgment, are subject to de novo review. *Meridian Leasing, Inc. v. Associated Aviation Underwriters, Inc.* 409 F.3d 342, 346 (6th Cir. 2005) (applying Michigan law) (citing *Campbell v. Potash Corp. of Sask., Inc.*, 238 F.3d 792, 797 (6th Cir. 2001)). "If a contract is clear and unambiguous ... there is no issue of fact to be determined." *Lincoln Elec. Co.*

v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672, 684 (6th Cir. 2000) (quoting *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio,* 15 Ohio St.3d 321, 474 N.E.2d 271, 272-73 (Ohio 1984)). In such instances, a court should not use extrinsic evidence to "attempt to discern the intent of the parties," but rather should determine their intent from "the plain language of the contract." *United States v. Donovan,* 348 F.3d 509, 512 (6th Cir. 2003). "The question of whether the language of an agreement is ambiguous is a question of law." *Id.* (citing *Parrett v. Am. Ship Bldg. Co.*, 990 F.2d 854, 858 (6th Cir. 1993)). Ambiguity exists "if the language is susceptible to two or more reasonable interpretations." *City of Wyandotte v. Consol. Rail Corp.*, 262 F.3d 581, 585 (6th Cir. 2001) (quoting *D'Avanzo v. Wise & Marsac, P.C.*, 223 Mich.App. 314, 565 N.W.2d 915, 918 (Mich. 1997)). "In making such a determination, a district court is counseled to read the contract as a whole, and to give the contract language its ordinary and natural meaning." *Id.* The above principles of contract interpretation establish that ordinarily judges interpret the language of contracts as a matter of law.

If a contract contains ambiguities, it generally becomes the task of the fact-finder to use extrinsic evidence to determine the intent of the parties. "When a contract is ambiguous, it is for the jury to determine the meaning of its terms, subject to proper instructions and based upon 'evidence of the surrounding circumstances and the practical construction of the parties.'" *Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276, 280 (6th Cir. 1974) (quoting *Tenn. Consol. Coal Co. v. United Mine Workers of Am.*, 416 F.2d 1192, 1198 (6th Cir. 1969)). The jury thus uses extrinsic parol evidence to resolve conflicting terms and meanings of an ambiguous contract. *Lincoln Elec. Co.*, 210 F.3d at 684-85 (quoting *Construction Interior Sys., Inc. v. Marriott Family Rests., Inc.*, 984 F.2d 749, 754 (6th Cir. 1993)).

Where there is no genuine issue of material fact appropriate for resolution by a fact-finder, however, a court may rely on extrinsic evidence to aid in contract interpretation. The First Circuit has reached the conclusion that "a judge may determine that the extrinsic evidence which is material is uncontested, and so appropriately enter [summary] judgment." *Nadherny v. Roseland Prop. Co.*, 390 F.3d 44, 49 (1 st Cir. 2004) (citing *Adria Int'l Group, Inc. v. Ferre Dev. Inc.*, 241 F.3d 103, 111 (1st Cir. 2001)). Or a court may determine that the evidence so overwhelmingly favors one interpretation of the contract that "no reasonable person could decide the contrary." *Id.* (quoting *Boston Five Cents Sav. Bank v. Sec'y of Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 8 (1st Cir. 1985)). Yet, the Fifth Circuit makes clear that when extrinsic evidence creates a genuine issue of material fact as to the parties' intent, the interpretation of the contract becomes a matter of fact appropriately resolved by a jury. *Southern Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079, 1081 (5th Cir. 1986).

In the instant case, none of the parties have argued that the contract is ambiguous or that a factual controversy exists regarding Ford's and OOCL's contractual intent, which would require resolution by a fact-finder. Instead, Appellants as well as Appellee and Third-Party Appellees in this case made cross-motions for summary judgment. Both sides argue that the plain language of the contract unambiguously favors the interpretations they advance. We reverse a district court's award of summary judgment when the contract at issue is ambiguous and the appealing party has raised a genuine issue of material fact. *See, e.g., NILAC Int'l Mktg. Group v. Ameritech Servs., Inc.*, 362 F.3d 354, 355 (6th Cir. 2004). In such instances, a jury and not a judge must consider extrinsic evidence when the contract's language does not make clear the intent of the parties. *Id.* at 359. By contrast, in the instant case Appellants have raised no genuine issue of material fact regarding ambiguous terms in the contract; there is no contested evidence for a jury to resolve. We therefore conclude that the only questions of contract interpretation in this case are matters of law and that we may proceed to analyze the contract.

3. Principles of Interpretation

Courts have often treated bills of lading as contracts of adhesion that are construed against the drafter, and Appellants urge us to do the same in the instant case. Ford is a large, sophisticated corporation with decades of experience engaging in international business transactions. For this reason, we hesitate to conclude definitively that the contract for carriage of goods entered into by Ford and OOCL was a contract of adhesion. *See, e.g., Union Planters Bank, N.A. v. Cont'l Cas. Co.*, 478 F.3d 759, 766 (6th Cir. 2007) (holding that although courts frequently treat occurrence-based insurance policies as contracts of adhesion, the panel would not similarly treat the contract at issue "entered into by sophisticated parties" absent evidence that the plaintiff-appellant "was prevented from negotiating" the disputed provision). But we note that several circuit courts of appeals have treated bills of lading as contracts of adhesion, without any caveats regarding the relative size and bargaining strength of the shipper and carrier. Courts resolve these ambiguities against the drafters of the bill of lading (usually the carriers), but do not hesitate to rule in favor of carriers where there are no ambiguities in the contract. *See, e.g., Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244, 1253 (8th Cir. 1994) (noting that "[a]lthough a bill of lading is a contract of adhesion, the language in APL's bills is clear and we can only interpret it to mean what it says"); *Mori Seiki USA, Inc. v. M/V Alligator Triumph,* 990 F.2d 444, 448 (9th Cir. 1993) (holding that although a bill of lading is a contract of adhesion and ambiguities must be construed against the carrier, no such ambiguity existed in the bill of lading in question); *SPM Corp. v. M/V Ming Moon,* 965 F.2d 1297, 1302 (3d Cir. 1992) (holding that a bill of lading with ambiguous liability-limitation provisions should be construed against the carrier); *Monica Textile Corp. v. S.S. Tana,* 952 F.2d 636, 643 (2d Cir. 1991) (holding that "every shipper knows ... bills of lading are contracts of adhesion ambiguities in which must be resolved against the carrier" (internal quotation marks omitted)).

We do not need to reach the conclusion that the bill of lading governing the liability provisions of the contract between Ford and OOCL was a contract of adhesion, however, because we can rely on the broader principle that ambiguities in contracts should be construed against the drafter. "If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances [,] the contract is ambiguous and should be construed against its drafter...." *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 455 (6th Cir. 2003) (quoting *Raska v. Farm Bureau Mut. Ins. Co.*, 412 Mich. 355, 314 N.W.2d 440, 441 (Mich. 1982)).

As an initial matter, we must determine who should be considered the drafter in this case, a question more complicated than one might think. Ford's legal department drafted the boilerplate, non-negotiable contract for ocean carriage that became the TSM between Ford and OOCL. J.A. at 502-04 (Dunn Dep. at 22-24). As we noted *supra,* Clause 10 of Ford's Supplemental Ocean Transportation Terms specifies that OOCL's bill of lading governs the liability of OOCL as the carrier. J.A. at 524 (Dunn Dep. at 72). There is no evidence that OOCL made its bill of lading absolutely nonnegotiable, but the uncontested evidence is that, although Ford had the opportunity to accept or reject the bill of lading, its terms were predetermined by OOCL and not open for negotiation. J.A. at 509-10 (Dunn Dep. at 31-32). A manager at OOCL, Keith Slack, testified that since 2000 OOCL had never changed its standard bill of lading language in any service-agreement negotiations. J.A. at 345 (Slack Dep. at 34-35); J.A. at 354-55 (Slack Dep. at 73-74). We are therefore faced with the question of whether we should consider Ford the drafter for purposes of applying the doctrine of *contra proferentum,*[5] or whether we should consider OOCL the drafter as the author of the specific instrument in question. *Restatement (Second) of Contracts* § 206 (1981), however, makes clear that in choosing among meanings of a specific term within a larger agreement, courts should generally prefer that meaning "which operates against the party who supplies the words." Accordingly, we apply the doctrine of *contra proferentum* against OOCL.

Even when this and other circuits have not termed bills of lading contracts of adhesion, federal appellate courts have nonetheless resolved ambiguities in admiralty contracts against the drafters of these contracts. *See, e.g., Navieros Oceanikos, S.A. v. S.T. Mobil Trader,* 554 F.2d 43, 48 (2d Cir. 1977); *Associated Metals & Minerals Corp. v. M/V Vishva Shobha,* 530 F.2d 714, 718 (6th Cir. 1976) (resolving ambiguity in the bill of lading "against the party ... which prepared the instrument"); *cf. Vistar, S.A. v. M/V Sea Land Express,* 792 F.2d 469, 471 (5th Cir. 1986) (holding that "ambiguities in the contract unresolved at trial are to be resolved against the party who drafted the contract"). Certainly, we should apply the doctrine of *contra proferentem* only "'so long as other factors' relevant to interpretation are 'not decisive[.]'" *B.F. Goodrich Co. v. U.S. Filter Corp.,* 245

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[5] The *contra proferentum* doctrine applies "where contractual language is found to have more than one interpretation. If the language is subject to more than one interpretation, ambiguities are construed against the drafter of the language." *Marquette Gen. Hosp. v. Goodman Forest Indus.,* 315 F.3d 629, 632 n. 1 (6th Cir. 2003) (applying Michigan law).

F.3d 587, 597 (6th Cir. 2001) (citing *Restatement (Second) of Contracts* § 206 cmt. a (1981)). The instant case, however, as we explain below, involves a decidedly ambiguous contract and no evidentiary dispute that might illuminate the parties' intent as to whether COGSA or Hague-Visby liability limitations apply.

4. The Meaning of the Contract

Before explicating the meaning of the contract, we observe that the TSM and the bill of lading, in particular, represent to us extremely poor drafting. The terms of the bill of lading are confused, conflicting, and opaque. Perhaps, Ford and OOCL as repeat players in the shipping industry are familiar with the byzantine labyrinth of clauses meant to govern liability for multimodal international transport. That they now ardently argue for two opposing interpretations of the contract language, however, belies the notion that they shared any common assumptions about the contract's meaning. Regardless, the parties now rely on this court to resolve the dispute between them and we are placed at a disadvantage in so doing because of the TSM's lack of clarity. The parties' sloppy drafting may represent carelessness or an attempt by each side to disguise its own intentions and evade hard negotiation. In either case, we urge Ford and OOCL to take far more care in drafting future multimodal shipping contracts, to avoid expensive litigation and unnecessarily consuming this court's resources.

The district court's grant of summary judgment to OOCL turned, in part, on its determination that Ford did not offer any extra consideration for the increase in OOCL's liability resulting from the use of Montreal as the port of discharge. *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 408 F.Supp.2d 415, 422 (E.D. Mich. 2005). Appellants, in contrast, argue that freight rates were higher when Montreal served as the port of discharge than when OOCL used a U.S. port. There does exist some cursory evidence that Ford and OOCL agreed upon higher rates to Montreal. A chart in the bill of lading lists consistently higher rates when the destination port is Montreal than when it is a port in the United States. J.A. at 74-75 (Rates and Charges). Without further explanation, however, this chart is not sufficient to determine that Ford and OOCL contracted for higher rates to Montreal for the purpose of covering OOCL's increased liability. Appellants have failed "to produce 'more than a mere scintilla of evidence' which would create a genuine dispute for the jury." *Leary v. Daeschner,* 349 F.3d 888, 897 (6th Cir. 2003) (quoting *Thompson v. Ashe,* 250 F.3d 399, 405 (6th Cir. 2001)). Neither is OOCL's blanket assertion that Ford did not bargain for higher liability rates adequate to persuade us that such an agreement did not exist. The problem in this case is that while the contract at issue is far from clear, the parties have simply made legal arguments and have not produced any evidence as to their contractual intent. In the absence of sufficient evidence to establish a genuine issue of material fact regarding the parties' intent, and because the parties have not averred that they would provide further evidence at trial, we apply the rule of *contra proferentum* in construing the ambiguous terms of this contract. *See Francosteel Corp. v. M/V Pal Marinos,* 885 F.Supp. 86, 89-90 (S.D.N.Y. 1995).

Ford and Royal argue that Clause 4(B)(2)(a) of the bill of lading mandates that if the loss or damage occurs at a known time or place, then OOCL's liability shall be that which is provided for by any international convention or national law that would have applied had the parties entered into a separate contract for that stage of transport. In the instant case, however, Clause 4(C) rather than Clause 4(B)(2)(a) is controlling. Prior language within 4(B)(2)(a) provides for the application of Clause 4(C) "where loss or damage occurs to the Goods from the time when the Goods are loaded on board the Vessel at the Port of Loading until the time when the Goods are discharged from the Vessel at the Port of Discharge." J.A. at 79 (Bill of Lading at 2). Because both parties agree that the loss and damage to Ford's auto transmissions occurred at sea, somewhere between Le Havre and Montreal, Clause 4(C) governs our interpretation of OOCL's liability.

The parties contest the meaning of Clause 4(C), the Clause Paramount. Clause 4(C) provides as follows:

> All carriage under this Bill of Lading ... shall have effect subject to any legislation enacted in any country making the Hague or Hague-Visby Rules compulsorily applicable and *in the absence of any such legislation* in accordance with the Hague Rules or COGSA in the case of carriage to or from the United States of America.

J.A. at 80 (Bill of Lading at 3). Appellants argue that COGSA applies only as a default, when legislation making the Hague or Hague-Visby Rules compulsorily applicable is not present. OOCL argues, in contrast, that because COGSA enacted the Hague Rules, reading Clause 4(C) in the manner urged by Appellants would render the last portion superfluous. In other words, OOCL suggests that if the contract was for the carriage of goods to the United States, both the first and second portions of Clause 4(C) would make COGSA applicable. But OOCL's argument for superfluity cuts against it as well as in its favor. In the case of carriage to the United States, the first portion of Clause 4(C) becomes redundant given the application of COGSA in the last portion of the Clause.

We agree with neither the interpretation of Clause 4(C) advanced by Ford and Royal nor that advanced by OOCL. The most reasonable interpretation of Clause 4(C) is that it anticipated three distinct situations: (1) carriage to and from two countries other than the United States subject to legislation in at least one of those countries making the Hague Rules or Hague-Visby Rules compulsorily applicable; (2) carriage to and from countries that made neither applicable, in which case the Hague Rules would apply as a default; (3) carriage between the United States and a foreign country, whereby COGSA would apply as a matter of law. This interpretation of Clause 4(C) explains the function of the language "in the absence of any such legislation" by recognizing the Clause's intention to make the Hague Rules the default liability scheme, absent effective legislation raising liability in accordance with the Hague-Visby Amendments. Our interpretation of Clause 4(C) also explains why there exists some redundancy of language when the carriage is to the United States. Our interpretation of Clause 4(C) yields the initial conclusion that the ocean carriage at issue between Le Havre and Montreal exemplifies the first anticipated situation because both France and Canada make Hague-Visby Rules compulsorily applicable.

Nevertheless, we must consider whether the multimodal contract at issue actually exemplifies,the third anticipated situation because the United States constitutes the ultimate destination of the goods, despite the ocean carriage's end in Montreal. OOCL argues that "COGSA applies to all carriage to and from the United States of America, whether by truck, rail, etc., and not merely when the port of loading or the port of discharge is a U.S. port." OOCL Br. at 27. If we read narrowly the language in Clause 4(C) "to or from the United States," then we would reach the conclusion that the carriage of goods by sea from Le Havre to Montreal did not involve carriage to the United States. Accordingly, the Hague-Visby Rules would apply because France is a contracting state and, under the first portion of Clause 4(C), the carriage would be subject to France's legislation making those rules compulsorily applicable. If, however, we read the language "to or from the United States" broadly, as OOCL suggests we should, then there would arise an internal conflict in Clause 4(C). The first portion of the Clause would make the Hague-Visby Rules applicable, and the last portion of the Clause would make COGSA applicable.

Because we are obligated by the doctrine of *contra proferentum* to construe ambiguities in the contract against OOCL as the drafter, we reach the conclusion that Clause 4(C) makes OOCL's liability subject to the Hague-Visby Rules and not COGSA. This conclusion is in keeping with other lower federal court cases that treat the mention of the Hague-Visby Rules in clauses paramount that are similar but not identical to the one at issue in the present case as demonstrating an agreement by the carrier to accept the Hague-Visby liability limits. *See, e.g., Itel Container Corp. v. M/V Titan Scan,* 139 F.3d 1450, 1454-55 (11th Cir.) (reading the general clause paramount to apply the Hague-Visby Rules in part because of the presence of a forum-selection clause applying English law that was more specific than the general boilerplate language of the clause paramount), *cert. denied,* 525 U.S. 962, 119 S.Ct. 405, 142 L.Ed.2d 328 (1998); *Francosteel Corp.,* 885 F.Supp. at 89-90 (construing a bill of lading against the carrier to find that the contract incorporated the Hague-Visby Rules); *Associated Metals v. M/V Star Skarven,* 1995 A.M.C. 505, 515 (S.D. Fla. 1994) (applying the Hague-Visby Rules in keeping with a "Visby Paragraph" of the general clause paramount to shipment from the contracting state of Finland); *Ilva U.S.A., Inc. v. M/V Botic,* Civ. A. No. 92-717, 1992 WL 296562, at *2, 1993 A.M.C. 240 (E.D. Pa. Oct.6, 1992) (finding that the first paragraph of the general clause paramount incorporated the Hague-Visby Rules into the bill of lading and the second paragraph made them compulsorily applicable); *Associated Metals & Minerals Corp. v. M/V Arktis Sky,* No. 90 Civ. 4562(JSM), 1991 WL 51087, at *5, 1991 A.M.C. 1499 (S.D.N.Y. Apr.3, 1991) (holding that the carriage of goods from Spain, which adopted the Visby Amendments, came under the scope of the second paragraph of the general clause paramount covering actions where the Hague-Visby Rules apply), *vacated and remanded on other grounds,* 978 F.2d 47 (2d Cir. 1992); *Daval Steel Prods. v. M/V Acadia*

Forest, 683 F.Supp. 444, 447 (S.D.N.Y. 1988) (holding that the bill of lading calls for the incorporation of the higher liability limits provided by the Hague-Visby Rules when issued in a jurisdiction where those rules apply); *cf. Francosteel Corp. v. M/V Deppe Europe,* No. 90 Civ. 1442(RPP), 1990 WL 121683, at *3, 1990 A.M.C. 2962 (S.D.N.Y. 1990) (holding that *Daval Steel* would be controlling but for the presence of a carrier option preserving the benefits of COGSA for the carriers). *But see Acciai Speciali Terni USA, Inc. v. M/V Berane,* 182 F.Supp.2d 503, 508 n. 8 (D.Md. 2002) (holding that the language of the general clause paramount is insufficient to demonstrate an agreement by a carrier to accept the Hague-Visby liability limits absent further evidence of this intent).

We next evaluate how Clause 4(C), the general clause paramount, interacts with Clause 4(D), which is entitled "USA Clause Paramount (if applicable)." Clause 4(D)(1) reads:

> If carriage *includes carriage to, from or through a port in the United States of America* this Bill of Lading shall be subject to COGSA, the terms of which are incorporated herein and shall be paramount throughout carriage by sea and the entire time that the Goods are in the actual custody of the Carrier or its sub-contractor *at the sea-terminal in the United States of America* before loading onto the Vessel or after discharge therefrom as the case may be. (emphasis added)

J.A. at 80 (Bill of Lading at 3). OOCL argues that the affidavit of Christy Beck, a customer serviceperson employed by OOCL who is familiar with the routing of goods by rail in the United States and Canada, establishes that the goods would have traveled by rail from Montreal to the Canadian Pacific Railyard in the Port of Detroit.

Appellants argue that Clause 4(D) is "expressly subjunctive and contingent" because preceded by the qualifying phrase "if applicable." Appellants Reply Br. at 18. Appellants also argue that the purported extension of COGSA in Clause 4(D)(1) to cover transshipment by land or sea "through" a port in the United States demonstrates OOCL's assumption that the law governing loss at sea was that enacted by the country in which the point of discharge was located. Appellants Br. at 14-15. Lastly, Appellants argue that Beck's loose use of the term "port" contravenes both the word's ordinary meaning and the technical definitions of the "Port of Detroit" and the "Port of Chicago," as explained by the Executive Director of the Detroit/Wayne County Port Authority, Curtis Hertel, and the Executive Director of the Illinois International Port District, Anthony Ianello. Appellants Reply Br. at 19 (citing Hertel Decl. at 2-3 and Ianello Decl. at 1-2). In sum, Appellants argue that the bill of lading provided for the goods' transport by rail from Montreal to railyards in Detroit and Chicago located outside those cities' ports and, therefore, the invocation of COGSA in Clause 4(D)(1) does not determine OOCL's liability.

The conflicting evidence and argument regarding the meaning of the term "port" establishes two plausible interpretations of Clause 4(D)(1). Without evaluating the relative credibility of the Beck Affidavit and the Hertel Declaration, we conclude that Hertel's interpretation of the meaning of the "Port of Detroit" better accords with the language of Clause 4(D)(1). Clause 4(D)(1) provides for the extension of COGSA by contract to the periods before goods are loaded on to the vessel and after they are discharged, so long as they are in the custody of OOCL or its subcontractor "at the sea-terminal in the United States of America." The latter phrase makes clear that OOCL intended the term "port" in Clause 4(D)(1) to refer to a "sea-terminal." Although OOCL averred that the Canadian Pacific Railyard is within the Port of Detroit, OOCL never argued that the railyard is a sea-terminal.

On the other hand, we have held above that as a matter of federal common law COGSA applies to the ocean voyage from Le Havre to Montreal despite the fact that Montreal is plainly not a U.S. port. The most reasonable interpretation of Clause 4(D)(1) is that OOCL intended to extend COGSA by contract when COGSA applied as a matter of law to the ocean voyage, to periods prior to and following "tackle-to-tackle," so long as the goods remained within the custody of OOCL or its subcontractor. Because we have held above that COGSA applies as a matter of federal common law to the carriage of goods from Le Havre to Montreal when the ultimate destination of the goods is in the United States, we hold that Clause 4(D)(1) is generally applicable. We therefore do not need to resolve the competing evidence regarding the definition of the Port of Detroit, which would remain the responsibility of a jury.

Clause 4(D)(1), however, does not specify to which particular situations it applies. If we take the language from Clause 4(D)(1)-"paramount throughout carriage by sea"-out of context, then it appears that OOCL intended to make COGSA applicable to both the sea voyage and the periods before and after discharge. When the clause is read as a whole and in harmony with the other clauses of the contract, however, it becomes clear that its purpose was to extend COGSA by contract, when COGSA was already applicable to the sea voyage, to the periods "before loading [the goods] onto the Vessel or after discharge therefrom." Clause 4(D)(1). Indeed, the attorney for OOCL admitted at oral argument that the intent of Clause 4(D)(1) was to extend COGSA beyond the tackle-to-tackle period. Because we reached the conclusion above that Clause 4(C) made the Hague-Visby Rules applicable to the sea voyage as a contractual matter, however, there is no need to invoke Clause 4(D)(1), which addresses the periods beyond the "tackle-to-tackle" period. In the instant case, the goods were lost at sea; therefore, this is not a case in which Clause 4(D)(1) comes into operation.

OOCL argues that Clause 4(D)(4) further extends COGSA by default to all carriage when COGSA does not otherwise apply. Clause 4(D)(4) states:

> *Except as provided herein in Clauses 4(D)(1) and (2), and where COGSA does not apply by operation of law,* Carrier's liability will be governed by COGSA unless its liability under some other body of law applicable to the particular stage of the transport where the loss occurred is more favorable to the Carrier (with regards to defenses and limitations), in which case that other body of law will apply.

J.A. at 80 (Bill of Lading at 3) (emphasis added). Here, we have held above that COGSA applied to the sea carriage of goods between Le Havre and Montreal as a matter of federal common law. Clause 4(D)(4) standing alone, therefore, does suggest that there exists no exception to COGSA's applicability under the bill of lading. But Clause 4(D)(4)'s provision for COGSA liability limitations conflicts with Clause 4(C)'s provision for the Hague-Visby Rules. This ambiguity once again forces us to resort to the doctrine of *contra proferentum*. Accordingly, we hold that Clause 4(C), which applied the Hague-Visby Rules, controls OOCL's liability.

One might argue that Clause 4(D)(4) trumps Clause 4(C). The contention would be that with the exception of situations anticipated by Clauses 4(D)(1) and (2) and those where COGSA does not apply as a matter of law, Clause 4(D)(4) makes COGSA's liability limitations applicable, regardless of what Clause 4(C) suggests. The key question, however, is whether Clause 4(C), the Clause Paramount, or Clause 4(D), the USA Clause Paramount, applies. The title of Clause 4(D)(4) explicitly makes that clause conditional by including the qualifying phrase "if applicable." Given the ambiguity as to whether Clause 4(C) or Clause 4(D)(4) applies, we believe it appropriate to place the burden on OOCL as the drafter of the bill of lading to explicitly and clearly state its own liability limits.

In addition, Himalaya Clauses in OOCL's bill of lading make Hague-Visby's liability limitations that are applicable to OOCL similarly applicable to Third-Party Appellees. Such clauses extend liability limitations to downstream parties expected to take part in the contract. *Kirby,* 543 U.S. at 20 & n. 2, 125 S.Ct. 385. Clause 1 of OOCL's bill of lading extends "the benefit of all the rights and defenses provided for" in the bill of lading to second persons or entities "including without limitation, the Vessel, her owner, operator, demise, time, slot and space charterer" who is also denominated a "carrier/bailee." J.A. at 78 (Bill of Lading at 1). Clause 25(c) provides that "the Vessel and every subcontractor of the Carrier of any nature whatsoever ... shall have the benefit of every right, defence [sic], limitation and liberty of whatsoever nature herein contained or otherwise available to the Carrier as if such provisions were expressly for its benefit...." J.A. at 84 (Bill of Lading at 7). Therefore, we hold that, because the Hague-Visby Rules govern OOCL's liability, they also govern that of Third-Party Appellees.

E. The Definition of a Package or Unit

As a matter of law and by agreement of the parties, the applicable version of the Hague-Visby Rules is the 1979 Special Drawing Rights Protocol ("the SDR Protocol"). As we held above, because the carriage of goods to Montreal originated in Le Havre and because France was a signatory to the Hague-Visby Rules, Clause 4(C) makes the Hague-Visby Rules applicable. France has adopted the SDR Protocol. J.A. at 157 (Courtois Decl. at ¶¶ 3-4). The SDR Protocol replaces Article IV(5)(a) of the Hague-Visby Rules and provides for the following liability limits:

> Unless the nature and value of such goods have been declared by the shipper before shipment

> and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67[SDR] per package or unit or 2[SDR] per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, December 21, 1979, *reprinted in* 6 *Benedict on Admiralty* 1-32.2 Doc. No. 1-2A (7th ed.2007). Thus, when the SDR Protocol is applicable, as in the current case, a court should limit the carrier's liability to the higher of 666.67 SDR per package or unit or 2 units of account per kilogramme of gross weight of the goods at issue.

Appellants argue that in the "Quantity" column of the bill of lading, OOCL identified and described each of the thousands of auto transmissions that Ford shipped as a "unit." Appellants Br. at 6, 25 (citing J.A. at 98 (OOCL Bills of Lading Ex. C. at 2)). OOCL does not dispute this contention and instead argues only that, under COGSA liability limits, each rack within the container rather than each auto transmission constitutes one COGSA package. OOCL Br. at 36-38. But we have reached the conclusion that the bill of lading binds OOCL by the Hague-Visby and not the COGSA liability limits. Accordingly, we turn to the bill of lading to assess the number of units listed by OOCL. The bill of lading, however, is sufficiently confusing to make it inadvisable for us to reach a conclusion as to the total number of units listed. A total of forty-three consecutive pages in the bill of lading include "Quantity" columns with various numbers of units listed. J.A. at 98-140 (OOCL Bills of Lading Ex. C at 2-44). An understanding of what exactly these numbers reference, where the pages duplicate and should not be counted twice, and ultimately how to calculate the total number of units listed requires a factual understanding of the practices of the shipping industry and specifically OOCL's bill of lading. Surveying and weighing such factual evidence is the job of the fact-finder. Therefore, we remand to the district court for further proceedings consistent with this opinion. We reiterate that, as a matter of law, the total number of units so listed will constitute the number of packages or units to be used to assess the limits set by the Hague-Visby Rules to OOCL's liability. Of course, the Hague-Visby Rules only set limits to liability; actual liability will depend on other relevant factors, which have not yet been addressed by the parties or the district court.

III. CONCLUSION

Because the district court erroneously interpreted the bill of lading to apply COGSA instead of the Hague-Visby Rules, and because additional briefing and fact-finding may be required before the liability limitation may be appropriately applied, we **REVERSE** the district court's judgment and **REMAND** this case for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-1199

[Filed May 8, 2008]

ROYAL INSURANCE COMPANY OF
AMERICA; FORD MOTOR COMPANY,
Plaintiffs-Appellants,

v.

ORIENT OVERSEAS CONTAINER
LINE LTD.,
Defendant-Appellee,

v.

M/V "Canmar Pride," CP Ships (UK) Ltd.,
CPS No. 3 Ltd., and CPS No. 5 Ltd.,
Third-Party Defendants-Appellees.

Before: BOGGS, Chief Judge, MERRITT and MOORE, Circuit Judges.

AMENDED JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 03-72574

[Filed September 29, 2005]

ROYAL INSURANCE COMPANY OF
AMERICA and FORD MOTOR CO.,
Plaintiffs,

v.

ORIENT OVERSEAS CONTAINER
LINE LTD.,
Defendant/Third-Party Plaintiff,

v.

M/V "Canmar Pride," her engines, boilers,
appurtenances, etc., in rem, CP SHIPS
(UK) LTD., CPS NO. 3 LTD., and CPS
NO. 5 LTD.,
Third-Party Defendants.

MEMORANDUM OPINION & ORDER REGARDING MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Royal Insurance Company of America ("Royal") and Plaintiff Ford Motor Company ("Ford") bring this action for damages resulting from the loss of cargo on an overseas shipment due to inclement weather. Plaintiffs allege that goods were either lost at sea or delivered in such a state of disrepair as to be unusable.

This matter is presently before the Court on three motions for partial summary judgment. In its Affirmative Defenses, Defendant Orient Overseas Container Line Limited ("OOCL") seeks a limitation of liability to $500 per package, pursuant to the United States Carriage of Goods By Sea Act, 46 App.U.S.C. § 1304 ("COGSA"). Plaintiffs filed a Motion for Partial Summary Judgment Striking Defendant's Sixth Affirmative Defense on January 31, 2005. Plaintiffs are seeking to strike Defendant's limitation of liability defense, arguing that the appropriate governing law in this case is the Hague-Visby Rules, which provide for greater limitation amounts than $500. Defendant filed a Motion for Partial Summary Judgment on February 3, 2005. Also on February 3, 2005, Third-Party Defendants M/V Canmar Pride, CP Ships (UK) Limited, CPS No. 3 Limited, and CPS No. 5 Limited filed a Motion for Partial Summary Judgment. Defendant and Third-Party Defendant each ask the Court to enter an order limiting their liability to $500, in accordance with COGSA.

The motions have been fully briefed and oral argument has been heard. For the reasons set forth below, the Court denies Plaintiffs' Motion for Partial

Summary Judgment, and grants in part and denies in part Defendant's Motion for Partial Summary Judgment and Third-Party Defendants' Motion for Partial Summary Judgment.

II. STATEMENT OF FACTS

Defendant is a member of an alliance of ocean carriers which "slot-charter" space on one another's vessels. This system allows Defendant to have a certain number of containers loaded aboard the vessel of another carrier for carriage between, among other places, LeHavre, France and Montreal, Canada. In the event this system is utilized, Defendant issues its form bill of lading for the containers being carried with the identification of the other carrier's vessel as the carrying vessel.

Plaintiffs entered into a written contract entitled "Transportation Services Main Agreement" ("TSM"), wherein it was agreed that Plaintiff Ford would deliver to Defendant "numerous ocean containers said to contain [6000 units of] automatic transmissions in racks ("Ford containers") for transportation from Blanquefort, France to Le Havre, France, and thereafter to Montreal, Canada for ultimate delivery to: Louisville, Kentucky; Hazelwood, Missouri; New Hope, Minnesota; Romulus, Michigan; Dearborn, Michigan; Westland, Michigan; and Montreal itself." Defendant arranged for Plaintiff Ford's shipment to be loaded on board Third-Party Defendant the M/V Canmar Pride. It is alleged that prior to the cargo reaching its destination, "numerous Ford containers were lost overboard and/or damaged during heavy weather." (Compl., ¶ 18.) More specifically, Plaintiffs allege 4387 transmission units, stowed in 26 containers, were lost. (Pls.' Mot. for Summ. J. at 4.) In addition, Plaintiffs allege 840 transmission units in six other containers were damaged. (*Id.*) Plaintiff Ford made a claim pursuant to its marine insurance policy and was paid $5,700,299.20 for its loss.

III. STANDARD OF REVIEW

Under Fed.R.Civ.P. 56, summary judgment is to be entered if the moving party demonstrates there is no genuine issue as to any material fact. The Supreme Court has interpreted this to mean that summary judgment should be entered if the evidence is such that a reasonable jury could find only for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *see also Lenz v. Erdmann Corp.*, 773 F.2d 62 (6th Cir. 1985). In resolving a summary judgment motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986); *Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983). But as the Supreme Court wrote in *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986):

> [T]he plain language of Rule 56(c) mandates the entry to summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential

> to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

To create a genuine issue of material fact, the nonmovant must do more than present "some evidence" of a disputed fact. "If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted). Accordingly, a nonmovant "must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact." *Mathieu v. Chun,* 828 F.Supp. 495, 497 (E.D.Mich. 1993) (citations omitted).

IV.APPLICABLE LAW & ANALYSIS

A. The TSM and Bills of Lading

Section 10 of the TSM provides a starting point in determining Defendant's and Third-Party Defendants' scope of liability in this matter. The section provides as follows:

> **10.** ***SELLER LIABILITY:*** Except as otherwise specified in this Agreement, Seller's liability for loss or damage to Buyer's commodities shall be determined in accordance with the terms and conditions of Seller's standard Bill of Lading (Appendix C). Buyer shall provide Seller with written notice of any claim for loss, damage, delay or misdelivery within 1 year of delivery or, in the case of Seller's failure to make delivery, within 1 year after a reasonable time for delivery has elapsed. Seller shall provide Buyer with written notice of any claim for undercharges or other related billing adjustments within 1 year of delivery of commodities. Seller shall not commence legal action against Buyer to recover any undercharges or related billing adjustments after 2 years of the time of delivery or the date that the commodities should have been delivered.

(TSM; see Def.'s Mot. for Summ. J., Ex. A) (emphasis in original).

Attached as Appendix C to the TSM is a document entitled "Seller's Bill of Lading." Section 4 of the Bill of Lading reads as follows:

> **4) CARRIER'S RESPONSIBILITY AND CLAUSE PARAMOUNT**
>
> (B) Combined Transport
>
> If carriage is Combined Transport then the Carrier undertakes to perform and/or in its own

name to procure performance of the carriage from the Place of Receipt or the Port of Loading whichever is applicable to the Place of Delivery or the Port of Discharge whichever is applicable and, save as is otherwise provided for in this Bill of Lading, the Carrier's liability for loss or damage to the Goods shall be as follows:-

* * *

2. If the stage of carriage during which loss or damage occurred is known

Notwithstanding anything provided for in Clause 4(B)(1) if the stage of the carriage where loss or damage to the Goods is known then subject to the operation of Clause 4(C) which shall apply where loss or damage occurs to the Goods from the time when the Goods are loaded on board the Vessel at the Port of Loading until the time when the Goods are discharged from the Vessel at the Port of Discharge the Carriers liability in respect of any such loss or damage occurring shall be determined as follows:-

By the provisions contained in any international convention or national law, which provisions cannot be departed from by private contract to the detriment of the Merchant, and would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of the carriage where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international Convention or national law applicable; or

If no international convention or national law is applicable then the liability of the Carrier shall be determined pursuant to the provisions of Clause 4(B)(1).

* * *

(C)Clause Paramount

All carriage under this Bill of Lading (whether electronically produced or not) shall have effect subject to any legislation enacted in any country making the Hague or Hague-Visby Rules compulsorily applicable and in the absence of any such legislation in accordance with the Hague Rules or COGSA in the case of carriage to or from the United States of America.

* * *

(D)USA Clause Paramount (if applicable)

If carriage includes carriage to, from or through a port in the United States of America this Bill of Lading shall be subject to COGSA, the terms of which are incorporated herein and shall be paramount throughout carriage by sea and the entire time that the Goods are in the actual custody of the Carrier or its sub-contractor at the sea-terminal in the United States of America before loading onto the Vessel or after discharge therefrom as the case may be.

(TSM, App. C, Seller's Bill of Lading; see Def.'s Mot. for Summ. J., Ex. A) (emphasis in original).

Finally, the Seller's Bill of Lading also contains a choice of law provision. The section contains the following language:

> **30) APPLICABLE LAW**
>
> This Bill of Lading, the Contract contained in and/or evidenced hereby, and the rights and obligations of all parties concerned in connection with the carriage of the Goods hereunder shall be governed by and construed in accordance with English law and any and all claims, suits, proceedings or disputes howsoever arising in connection with such Bill of Lading, contract, rights and obligations shall be determined in accordance with English law.
>
> If the carriage of Goods hereunder is foreign trade to, from or through a port in the United States or if COGSA shall for any reason whatsoever apply compulsorily to the carriage of Goods hereunder then this Bill of Lading, the contract contained in and/or evidenced hereby, and the rights and obligations of all parties concerned in connection with the carriage of the Goods hereunder shall be governed by and construed in accordance with United States law and all claims, suits, proceedings or disputes howsoever arising in connection with such Bill of Lading, contract, rights and obligations shall be determined in accordance with United States law.

(TSM, App. C, Seller's Bill of Lading; see Def.'s Mot. for Summ. J., Ex. A) (emphasis in original).

B. Application of COGSA Limitation as a Matter of Law

Defendant and Third-Party Defendants argue that the $500 per package limitation found in COGSA applies to the instant matter as a matter of law. The statute provides, "[t]his chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 App. U.S.C.A. § 1312. Although the Ford transmissions were loaded in France for delivery to Montreal by ship, Defendant and Third-Party Defendants maintain that COGSA applies as a matter of law because the ultimate destination was the United States.

Defendant and Third-Party Defendants rely on *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004), where the Supreme Court discussed the nature of maritime contracts and the application of federal law. In *Kirby,* an Australian cargo owner sued a railroad company for damages sustained because of a train derailment in the United States. *Kirby,* 125 S.Ct. at 385. The railroad argued that its liability was limited by the bills of lading issued by the Australian freight forwarder and the ocean carrier. *Id.* The Court held that the railroad's liability was indeed limited by the bills of lading because the railroad was an intended beneficiary of the maritime contract. *Id.* at 397.

The *Kirby* decision acknowledges the complex nature of modern-day international shipping contracts, in which several modes of transportation may be called upon, including the use of ships, trucks, and trains. The Court resolved the question of how to classify such multimodal contracts, stating that, "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce-and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage." *Id.* at 394. Notably, *Kirby* did not go so far as to say that federal law applies whenever the final destination is the United States.

The list of cases considering whether COGSA applies as a matter of law to shipments with a final destination in the United States is short. In *Tarnawski v. Schenker, Inc.*, 2003 WL 22721987 (W.D. Wash. May 6, 2003), the district court was confronted with a case involving the shipment of vodka from Poland to Seattle, Washington. *Id.* at *1. The vodka was scheduled to be shipped from Germany to Canada, then placed on a truck for ultimate delivery to Seattle. The plaintiff argued that since the vodka was shipped overseas from Hamburg, Germany to Montreal, Canada, there was no foreign sea transport to a United States port as required by COGSA. *Id.* at *3. Despite the lack of involvement of a United States port, the court in *Tarnawski* applied COGSA, stating, "this fact does not prevent COGSA from applying in this case." *Id.* The court cited *Joe Boxer Corp. v. Fritz Transp. Int'l*, 33 F.Supp.2d 851, 855 (C.D.Cal. 1998), where the district court held that the best reading of COGSA is that it only applies when the cargo engaged in foreign trade has a point of origination or "ultimate destination" in the United States. *Id.* The court in *Tarnawski* seized upon this interpretation of the scope of COGSA in concluding as follows, "[h]ere, Tarnawski's vodka traveled by sea from a foreign point of origin with the ultimate destination of the United States, it doesn't matter what countries may have been touched en route COGSA applies as a matter of law." *Tarnawski,* 2003 WL 22721987 at *3.

While neither *Tarnawski* nor *Joe Boxer* are "controlling authority" as Defendant claims, the two cases provide guidance to this Court all the same. The situation presented in this case is strikingly similar to that facing the *Tarnawski* court. Ford contracted with Defendant for the delivery of its transmissions from France to cities across the United States. As Defendant points out, "Ford viewed this as a contract for the movement of containers from foreign places to places within the United States." (Def.'s Mot. at 2 (citing Ex. C at 21, 64); Pls.' Resp. at 2.) More tellingly, the Bills of Lading all specify the places of delivery as cities within the United States. (See Def.'s Mot., Ex. B). The Bills of Lading clearly provide the "Place of Receipt" as Blanquefort, the "Port of Loading" as Le Havre, the "Port of Discharge" as Montreal, and the "Place of Delivery" as, alternatively, Louisville, Kentucky; New Hope, Minnesota; Hazelwood, Missouri; Westland, Michigan; Romulus, Michigan; Dearborn, Michigan; and Montreal. (See Def.'s Mot., Ex. B.)

The Bill of Lading also clearly outlines Defendant's responsibility: "the Carrier undertakes to perform and/or in its own name to procure performance of the carriage from the Place of Receipt or the Port of Loading whichever is applicable to the Place of Delivery or the Port of Discharge whichever is applicable." (Bill of Lading Section 4(B); TSM, App. C, Seller's Bill of Lading; see Def.'s Mot. for Summ. J., Ex. A & Ex. B.) Here Defendant's responsibility began in the specified Place of Receipt, Blanquefort, and ended in the specified Places of Delivery. There is no allegation that Plaintiffs bargained for using Montreal as the Port of Discharge. While the Parties debate whether Defendant would have been able to use a Port of Discharge in the United States without notice to Ford, it seems clear to the Court that the issue of limited liability cannot turn on the seemingly insignificant and unbargained for decision of where to discharge the Ford transmissions en route to the United States. Exhibit B of the TSM contains a list of Defendant's Rates and Charges for various transatlantic voyages. The possibilities for the Port of Discharge to various final destinations within the United States are New York, Houston, Charleston, Norfolk, and, of course, Montreal. (Def.'s Mot. for Summ. J., Ex. A.) It would be strange indeed to have Defendant's ability to limit its liability vary to such a great degree simply based on the Port of Discharge utilized in transporting shipments to final destinations within the United States. Equally odd would be the proposition that several Ford shipments-potentially using different Ports of Discharge–would vary in liability to Defendant. Such a result strikes this Court as an improperly narrow reading of COGSA.

Acciai Speciali Terni USA, Inc. v. M/V BERANE, 182 F.Supp.2d 503 (D.Md. 2002) supports this Court's finding. *Acciai* held that COGSA, rather than the Hague-Visby Rules as adopted by Italy, set the limit of the potential liability of a carrier and charterer of the carrying vessel for damage to cargo shipped from Italy to the United States. The court further found that the general paramount clause was insufficient to demonstrate an agreement by the carrier to accept the Hague-Visby liability limits on shipments to the United States because there was no evidence to suggest that the shipper paid anything extra for an increase in the carrier's limited liability. Finally, the *Acciai* court held that the bill of lading contained a clause stating that if the bill of lading was subject to COGSA, then COGSA would govern it.

Though the present case does not concern a direct transatlantic shipment to the United States, several parallels may be drawn from *Acciai*. The most important parallel is that Ford does not appear to have paid anything extra for any alleged increase in Defendant's liability resulting from the decision to use Montreal as the Port of Discharge. Second, the Bill of Lading presently at issue can only be read harmoniously if COGSA is held to apply.

As the Second Circuit noted in *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines,* 230 F.3d 549 (2d Cir. 2000), the TSM and the Bill of Lading are not "model[s] of careful draftsmanship." *Id.* at 556. Here there are several provisions of the agreements seemingly applicable because of the loss of and damage to the Ford transmissions. First, Section 10 of the TSM, entitled "Seller Liability," refers generally to the terms and conditions set forth in the Bill of Lading. Examining the Bill of Lading demonstrates that there are two applicable choice-of-law provisions, as was the case in *Hartford*. Section 4 of the Bill of Lading invokes "the provisions contained in any international convention or national law...." (Section 4(B)(2) of the

Bill of Lading; Def.'s Mot. for Summ. J., Ex. A.) The Clause Paramount makes the Hague-Visby Rules applicable except in the case of carriage to or from the United States-in which case COGSA applies. (Section 4(C) of the Bill of Lading.) It is important to note that the Clause Paramount requires COGSA if the "carriage" is to or from the United States, not only via the use of a United States seaport. The agreements entered into between Plaintiffs and Defendant clearly contemplate delivery to cities in the United States. Defendant was obligated to transport the Ford transmissions to these locations, using a variety of transportation methods including the necessary transatlantic journey.

Section 4(D) of the Bill of Lading is labeled "USA Clause Paramount (if applicable)." Predictably, the Bill of Lading does not specify when this alternative clause paramount actually applies. Section 4(D) contains more specific language than that found in Section 4(C); the USA Clause Paramount requires the application of COGSA when the carriage "includes carriage to, from or through a port in the United States of America...." Plaintiffs seek a close reading of Section 4(D), arguing that the shipment presently at issue did not involve carriage to, from or through a port of the United States. Such a reading, while plausible, does not persuade the Court in this context.

The second choice of law provision found in the Bill of Lading is Section 30, entitled "Applicable Law." Although the first paragraph of Section 30 invokes English law as the choice of law, the second paragraph excepts situations where "the carriage of Goods hereunder is foreign trade to, from or through a port in the United States or if COGSA shall for any reason whatsoever apply compulsorily to the carriage of Goods hereunder...." The Bill of Lading thus clearly contemplates that COGSA may apply even when the carriage is not to, from or through a United States port per se. To read the contract otherwise would be to make this provision seemingly superfluous. "In a situation of potential contract ambiguity, an interpretation that gives a reasonable and effective meaning to all terms of a contract is preferable to one that leaves a portion of the writing useless or inexplicable." *Hartford,* 230 F.3d at 558 (citations omitted). As noted above, COGSA applies here because the transmissions were destined for the United States. Defendant and Third-Party Defendants are thus entitled to the $500 per package limitation contained in COGSA.

B. Package Limitation

Having found COGSA applicable, the Court must also decide what constitutes a "package" for purposes of the limitation of liability. COGSA provides as follows:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of

> lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

46 App.U.S.C.A. § 1304(5). In order to determine what constitutes a "package" under COGSA, courts consider the following four factors: (1) the parties' contractual agreement in the bill lading; (2) whether the COGSA package is the result of some amount of preparation for purpose of transportation, which also facilitates handling; (3) a container can be considered a COGSA package only in light of a clear agreement to that effect between the parties; and (4) when goods are placed in containers without being described as separately packaged, they are classified as "goods not shipped in packages" for COGSA purposes, absent agreement otherwise. *See Groupe Chegaray / V. De Chalus v. P & O Containers,* 251 F.3d 1359 (11th Cir. 2001).

Defendant and Third-Party Defendants argue that a "package" for purposes of this case should be defined as each container, not each of the individual Ford transmissions contained therein. As support for their contention, Defendant and Third-Party Defendants cite the Bill of Lading, which contains the following language: "TOTAL NO. OF CONTAINERS/ PACKAGES RECEIVED & ACKNOWLEDGED BY CARRIER FOR THE PURPOSE OF CALCULATION OF PACKAGE LIMITATION (IF APPLICABLE): 5 CONTAINER(S)/PACKAGE(S)." (Def.'s Mot., Ex. B) (emphasis in original). Courts hesitate to simply apply such language found in bills of lading. *See, e.g., Monica Textile Corp. v. S.S. Tana,* 952 F.2d 636, 641 (2d Cir. 1991) (Court takes a "critical look" at bill of lading clauses purporting to define container as "package", and casts a "jaundiced eye" upon language purporting to embody any such definitional agreement). This Court does not look upon the language contained in the Bill of Lading as determinative of the issue of how many COGSA packages are at issue.

Plaintiffs correspondingly argue that each Ford transmission should be deemed a "package" under COGSA. The Court finds this interpretation also incorrect. The declaration of Alan Dunn of Ford makes clear that the racks-not the smaller number of containers or the larger number of individual transmissions-constitute "packages" within the meaning of COGSA. (See Def.'s Reply Br. at 4-5.) Dunn explained that "the racks used by the shipper Ford Aquitane to carry the Ford transmissions from France to the United States are 'articles of transport,' as their sole function is to provide an accessible and practical means of transport for numerous transmissions during intercontinental shipments." (*Id.*) The racks here can be appropriately deemed the result of some amount of preparation for purpose of transportation, which also facilitates handling. *P & O Containers,* 251 F.3d at 1359.

C. Defendant's Motion for Summary Judgment Concerning Proof of Physical Damage

In addition to the above, Defendant seeks summary judgment with respect to the damaged Ford transmissions.[1] (Def.'s Mot. for Partial Summ. J. at 25.) Defendant asserts that many of the allegedly damaged Ford transmissions showed no physical damage and were not tested to confirm that they were damaged. (*Id.*) Third-Party Defendants also raise this issue in their Motion. (See Third-Party Defs.' Mot. for Partial Summ. J. at 18-19.) Third-Party Defendants cite the lack of visible damage to the Ford transmissions, and Ford's alleged lack of proof of non-visible damage to the transmissions. (*Id.*)

In response, Ford notes the Court's November 8, 2004 Initial Scheduling Order on Package Limitation Issue Only. Ford argues that only the package limitation issue had been agreed upon by the Parties and the Court to be briefed and heard. (Pls.' Resp. to Third-Party Defs.' Mot. at 1.) In their very own Motion, Third-Party Defendants concede this fact: "[t]he present Motion by agreement of the parties and the Court is confined to the applicability of COGSA's package limitation." (Third-Party Defs.' Mot. at 2, n. 1.) The Court agrees that the issue of the allegedly damaged Ford transmissions has not been properly raised by Defendant or Third-Party Defendants at this juncture. This portion of Defendant's and Third-Party Defendants' Motion is therefore dismissed without prejudice.

---

[1] While a number of Ford transmissions were irretrievably lost overboard during the tran-atlantic shipment, a number of Ford transmissions arrived in Montreal damaged.

V. CONCLUSION

For the reasons set forth above, the Court grants Defendant's and Third-Party Defendants' Motions for Partial Summary Judgment on the issue of the limitation of liability only. The Court denies Plaintiffs' Motion for Partial Summary Judgment.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment Striking Defendant's Sixth Affirmative Defense **[Docket No. 39, filed January 31, 2005]** is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Partial Summary Judgment **[Docket No. 43, filed February 3, 2005]** is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Third-Party Defendants' Motion for Partial Summary Judgment **[Docket No. 45, filed February 3, 2005]** is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that the Parties appear for a status conference on November 8, 2005, at 3:30 p.m.

s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: September 29, 2005

s/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: September 29, 2005

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 29, 2005, by electronic and/or ordinary mail.

s/William F. Lewis
Case Manager

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-1199

[Filed May 8, 2008]

ROYAL INSURANCE COMPANY OF)
AMERICA; FORD MOTOR COMPANY,)
Plaintiffs-Appellants,)
)
v.)
)
ORIENT OVERSEAS CONTAINER)
LINE LTD.,)
Defendant-Appellee,)
)
v.)
)
M/V "CANMAR PRIDE," CP SHIPS)
(UK) LTD., CPS NO. 3 LTD., AND)
CPS NO. 5 LTD.,)
Third-Party Defendants-Appellees.)
)

Before: BOGGS, Chief Judge; MERRITT and MOORE, Circuit Judges.

ORDER

This matter is before us on petitions for panel rehearing filed by Defendant-Appellee Orient Overseas Container Line Ltd. and Third-Party Defendants-Appellees MN "Canmar Pride," CP SHIPS (UK) Ltd., CPS No. 3 Ltd., and CPS No. 5 Ltd. We hereby DENY the petitions except as follows. The court's published opinion filed on January 30, 2008 is amended in two ways.

First, on page 11 of the slip opinion we add one sentence to the paragraph starting with "As an initial matter, we must determine who should be considered. . ." after the fourth sentence ending with ". . . not open for negotiation. J.A. at 509-10 (Dunn Dep. at 31-32)." as follows:

> A manager at OOCL, Keith Slack, testified that since 2000 OOCL had never changed its standard bill of lading language in any service-agreement negotiations. J.A. at 345 (Slack Dep. at 34-35); J.A. at 354-55 (Slack Dep. at 73-74).

Second, on page 16 of the slip opinion we replace the first paragraph of part II.E. starting with "Article 2 of the Visby Amendments replaced Article IV(5) . . ." with the following new paragraph:

> As a matter of law and by agreement of the parties, the applicable version of the Hague-Visby Rules is the 1979 Special Drawing Rights Protocol ("the SDR Protocol"). As we held above, because the carriage of goods to Montreal originated in Le Havre and because France was a signatory to the Hague-Visby Rules, Clause

4(C) makes the Hague-Visby Rules applicable. France has adopted the SDR Protocol. J.A. at 157 (Courtois Decl. at ¶¶ 3-4). The SDR Protocol replaces Article IV(5)(a) of the Hague-Visby Rules and provides for the following liability limits:

> Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 [SDR] per package or unit or 2 [SDR] per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, December 21, 1979, *reprinted in* 6 *Benedict on Admiralty* 1-32.2 Doc. No. 1-2A (7th ed. 2007). Thus, when the SDR Protocol is applicable, as in the current case, a court should limit the carrier's liability to the higher of 666.67 SDR per package or unit or 2 units of account per kilogramme of gross weight of the goods at issue.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil Case No. 07-62-HU

[Filed August 15, 2007]

MAZDA MOTORS OF AMERICA,)
INC., and Indemnity Insurance Co.)
of North America,)
Plaintiffs,)
)
v.)
)
M/ V COUGAR ACE, her engines,)
tackle and appurtenances, *in rem*,)
Defendant.)
)

Charles S. Jordan, Michelle Buhler, Danielson Harrigan Leyh & Tollefson, Seattle, WA, for Plaintiff. John D. Kimmerlein, Philip R. Lempriere, Keesal, Young & Logan, Seattle, WA, for Defendant.

ORDER

KING, Judge.

The Honorable Dennis Hubel, United States Magistrate Judge, filed Findings and Recommendation on July 5, 2007. The matter is before this court. *See* 28 U.S.C. § 636(b)(1)(B) and Fed.R.Civ.P. 72(b). Plaintiffs filed objections to the Findings and Recommendation, and defendant filed a response.

When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. *See* 28 U.S.C. § 636(b)(1)(C); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir.1981), *cert. denied,* 455 U.S. 920 (1982).

Having given a *de novo* review of the issues raised in the objections to the Findings and Recommendation, I find no error.

Accordingly, I ADOPT Judge Hubel's Findings and Recommendation (# 24) and I GRANT defendant's Motion to Dismiss (# 6).

Dated this 15th day of August, 2007.

/s/ Garr M. King
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil Case No. 07-62-HU

[Dated July 5, 2007]

MAZDA MOTORS OF AMERICA, INC., and Indemnity Insurance Co. of North America,
Plaintiffs,

v.

M/ V COUGAR ACE, her engines, tackle and appurtenances, *in rem*,
Defendant.

FINDINGS AND RECOMMENDATION

HUBEL, Magistrate Judge.

This is an *in rem* admiralty action against the M/V COUGAR ACE by Mazda Motors of America, Inc. (Mazda America) and its subrogated cargo insurer, Indemnity Insurance Company of North America. Plaintiffs sue the COUGAR ACE for cargo damage to a shipment of Mazda automobiles.

The owner of the COUGAR ACE is MOB Cougar (Pte) Ltd. (MOB Cougar). MOB Cougar appears in this action solely to claim the COUGAR ACE, and moves to dismiss the complaint pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, on the ground that the bills of lading contain a forum selection clause requiring that this action be brought in Japan.

Factual Background

In July 2006, Mazda International Company, Ltd. consigned a cargo of 3,140 Mazda automobiles to Mazda America, its wholly owned subsidiary. The cargo was loaded aboard the COUGAR ACE in Japan, to be carried from Japan to Tacoma, Washington and Port Hueneme, California, under three bills of lading. The cargo carrier was Mitsui O.S.K. Lines, which apparently chartered the COUGAR ACE from MOB Cougar. The COUGAR ACE is named in the bills of lading.

Paragraph 28 of the bills of lading contains the forum selection clause, which provides:

> 28. LAW AND JURISDICTION
>
> The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein. Unless otherwise agreed, any action against the Carrier thereunder must be brought exclusively before the Tokyo District Court in Japan.

Declaration of John Kimmerlein, Exhibit A, p. 10.

Discussion

A. *The forum selection clause*

The parties agree that the COUGAR ACE ratified the bills of lading by sailing with the cargo. "When cargo has been stowed on board the vessel and bills of lading are issued, the bills of lading become binding contracts of the vessel *in rem* upon the sailing of the vessel...." *Cactus Pipe & Supply Co. v. M/V MONTMARTRE,* 756 F.2d 1103, 1113 (5th Cir. 1985). See also *Union Steel America Co. v. M/V SANKO SPRUCE,* 1999 AMC 372, 375 n. 2 (D.Or. 1998)(quoting *THE MONTMARTRE*).

If a vessel is subject to liability under the relevant bills of lading based on such constructive ratification, "it should also benefit from any protective provisions of such bills such as the forum selection clause." *THE SANKO SPRUCE,* 1999 AMC at n. 2. Furthermore, under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300-1315, the responsibilities and liabilities of the vessel are the same as those of the carrier. 46 U.S.C. § 1303. Paragraph 32 of the bills of lading incorporates COGSA:

> 32. US CLAUSE PARAMOUNT
>
> (1) If the Carriage covered by this Bill of Lading includes Carriage to or from a port or place in the United States of America, this Bill of Lading shall be subject to the United States Carriage of Goods by Sea Act 1936 (U.S. COGSA), the terms of which are incorporated herein and shall govern throughout the entire time during which

> the Goods are in the actual custody of the Carrier.

Kimmerlein Declaration, Exhibit A, p. 10.

Nevertheless, plaintiffs assert that the language of the forum selection clause does not apply to *in rem* claims asserted against the COUGAR ACE, because the scope of the forum selection clause in the bills of lading is limited to any action "against the Carrier," and the bills of lading define "Carrier" as "Mitsui O.S.K. Lines, Ltd." Plaintiffs argue that because the forum selection clause does not identify the COUGAR ACE, the clause is not applicable to this *in rem* action.

Plaintiffs rely on a line of cases beginning with the Supreme Court's decision in *THE MONROSA v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), and holding that *in rem* actions are not governed by forum selection clauses that do not explicitly name the vessel. In *THE MONROSA*, the vessel moved to dismiss based on a forum selection clause in a bill of lading that provided:

> [N]o legal proceedings may be brought against *the Captain or Shipowners or their Agents* in respect to any loss or damage to any goods herein specified except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there.

359 U.S. at 182 (emphasis added). The Court concluded that the forum selection clause did not apply to a suit *in rem*.

> [T]his clause should not be read as limiting the maintenance of an action *in rem* against the vessel to enforce a maritime lien for proper carriage. The initial words are particularly appropriate to a restriction of the clause to *in personam* actions, and the rest of the language is intelligible on this premise.... [W]e will not stretch the language when the party drafting such a form contract has not included a provision it easily might have....

Id. at 182-83. See also *Loomis v. SS SANTA ROSA,* 447 F.2d 105 (9th Cir. 1971)(limitation clause "did not expressly apply to proceedings *in rem* against the vessel").

In contrast, other cases hold that broader forum selection clauses applicable to "any dispute" or "any claim or dispute" arising under the bills of lading, not explicitly limited to the carrier, are applicable to actions *in rem. THE BREMEN v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972); *Sembawang Shipyard Ltd. v. M/V CHARGER,* 955 F.2d 983 (5th Cir. 1992); *Reed & Barton Corp. v. M/V TOKIO EXPRESS,* 1999 AMC 1088 (S.D.N.Y. 1999); *Holmes v. Westport Shipyards, Inc.,* 2004 AMC 1640 (S.D. Fla. 2004); see also *Packers v. Dole,* 2006 AMC 370, 372 (M.D. Fla. 2005)("any suit against the Carrier, his agents, or the vessel").

MOB Cougar counters that plaintiffs' reliance on THE *MONROSA* is misplaced because *THE*

MONROSA reflects judicial hostility to forum selection clauses on public policy grounds; this trend was reversed by the time of the Supreme Court's decision in *THE BREMEN,* where the Supreme Court held that public policy favored the enforcement of forum selection clauses in admiralty cases. See also *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER,* 515 U.S. 528 (1995)("historical judicial resistance to foreign forum selection clauses has little place in an era when ... businesses once essentially local now operate in world markets.")(quoting *THE BREMEN,* 407 U.S. 1, 32 (1972).

MOB Cougar asserts further that *THE MONROSA* is distinguishable because the pertinent clause of the bill of lading expressly consented to *in rem* jurisdiction:

> ... it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, *notwithstanding that the ship may be legally represented there.*

(Emphasis added). Such consenting language does not appear in the bills of lading at issue here.

Plaintiffs counter that because the bills of lading are contracts of adhesion drafted by the carrier, they should be strictly construed against the carrier. See *All Pacific Trading Inc. v. M/V HANJIN YOSU,* 7 F.3d 1427, 1431 (9th Cir. 1993)("Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore "strictly construed against the carrier."); *Institute of London Underwriters v. Sea-Land Service, Inc.,* 881 F.2d 761, 767 (9th Cir.

1989)(any ambiguity in bill of lading must be construed in favor of the shipper and against the carrier). But this rule has recently been rejected by the Supreme Court, which has held that contracts for the carriage of goods are to be construed like other contracts, by their terms and consistent with the intent of the parties, without any particular requirement of strict construction. *Norfolk Southern Railway Co. v. Kirby,* 543 U.S. 14, 31 (2004).

I am unpersuaded by the plaintiffs' argument that the COUGAR ACE cannot invoke the protection of the forum selection clause because that clause names only the "Carrier," for two reasons. First, the COUGAR ACE is a party to the bills of lading by virtue of ratification, and is therefore entitled to the benefit of their protective provisions, such as the forum selection clause. *THE SANKO SPRUCE,* 1999 AMC at n. 2. Second, the bills of lading incorporate the terms of COGSA, which imposes the same liabilities (and necessarily the same defenses) on the vessel as on the carrier. Absent a rule of strict construction, which no longer exists, I can find no logical explanation for not including the COUGAR ACE, the performing carrier, within the scope of the forum selection clause.

B. *The Himalaya clause*

MOB Cougar asserts in its reply that Paragraph 4(2) of the bills of lading also precludes plaintiffs from bringing an *in rem* action against the COUGAR ACE. Paragraph 4(2) provides:

> The Merchant undertakes that no claim or allegation shall be made against any servant,

> agent or Sub-Contractor of the Carrier which imposes or attempts to impose upon any of them, or upon any vessel owned or operated by any of them, any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing, every such servant, agent and Sub-Contractor shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for their benefit; and in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents, and Sub-Contractors.

Kimmerlein Affidavit, p. 2. This provision, called a Himalaya clause, is a "clause commonly used to extend a carrier's defenses and liability limitations to certain third parties performing services on its behalf." *Mori Seiki USA v. M/V ALLIGATOR TRIUMPH,* 990 F.2d 444, 450 (9th Cir. 1993); 2 T. Schoenbaum, *Admiralty and Maritime Law* (3d ed. 2001) § 10-11 (purpose of a Himalaya clause is to extend to third parties the defenses and limitation of liability of COGSA, which by its terms applies to the carrier and the vessel.)

Despite the parties' agreement that the COUGAR ACE is bound by the bills of lading, and therefore subject to both the liabilities and the defenses contained in the bills of lading, both sides have briefed the issue of whether the third party protections provided by the Himalaya clause should be construed to apply to the COUGAR ACE.

I am not persuaded that, as a party to the bills of lading, the COUGAR ACE need have the status of a third party beneficiary under the Himalaya clause to invoke the protection of the forum selection clause. Conceptually, it is difficult to conceive of the COUGAR ACE as both a party to the bills of lading (as the parties agree) and a third party beneficiary of them. But because MOB Cougar has made this argument, I will consider it.

MOB Cougar argues that the first sentence of the Himalaya clause requires plaintiffs to bring their claims only against the Carrier, and prohibits them from suing other parties, including the COUGAR ACE, for cargo damage. It argues that the second sentence provides that if a claimant disregards the first sentence, the COUGAR ACE's owner, which fits within the definition of "Sub-Contractor," will be entitled to the rights and defenses of the carrier, including the forum selection clause, in defending itself or its vessel from the Merchant's claims.

Paragraph 1 of the bills of lading defines Subcontractors to include "owners and operators of Vessels and ... any independent contractor directly or indirectly employed by the Carrier in performance of the Carriage ... and anyone assisting the performance of the Carriage." MOB Cougar argues that this definition encompasses both itself, as the owner of the COUGAR ACE, and the COUGAR ACE, because the COUGAR ACE was employed by the carrier in performance of the cargo carriage. MOB Cougar argues that under the Himalaya clause, subcontractors used in the carriage of goods are entitled to the same benefits under the bills of lading as the carrier.

The plaintiffs respond that 1) the COUGAR ACE is not a Himalaya clause beneficiary, because a Himalaya clause governs the rights of a third party and has no application to the COUGAR ACE, which is a party to the bill of lading in her own right by virtue of ratification; and 2) the language of the Himalaya clause, both standing alone and in context, shows that it is not intended to apply to the COUGAR ACE.

1. *Is the COUGAR ACE a third party beneficiary of the Himalaya clause?*

Plaintiffs begin with the mistaken contention that Himalaya clauses are to be strictly construed and limited to intended beneficiaries. Consequently, they argue, when a party seeking protection under a Himalaya clause is not specifically mentioned in the clause, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which the benefits are extended. *Id.* Plaintiffs argue that these intended beneficiaries are such third parties as stevedores, terminal operators, shipyards, vessel managing agents, and inland carriers, but not vessels that are themselves parties to the bill of lading.

As discussed above, the notion that contracts of carriage in general, and Himalaya clauses in particular, are to be strictly construed has been rejected by the Supreme Court. *Norfolk Southern Railway,* 543 U.S. at 31. Plaintiffs' argument that the Himalaya clause must be strictly construed to exclude the COUGAR ACE as a third party beneficiary of the Himalaya clause is unavailing.

2. *Does the language of the bill of lading designate the COUGAR ACE as a Himalaya clause beneficiary?*

The first sentence of the Himalaya clause states: "The Merchant undertakes that no claim or allegation shall be made against any servant, agent or Sub-Contractor of the Carrier which imposes or attempts to impose upon any of them, or upon any vessel owned or operated by any of them,[1] any liability whatsoever in connection with the Goods ..." (Emphasis added). Plaintiffs argue that the term "vessel" is not an object in this sentence that is to be construed with "servant," "agent," or "Sub-Contractor," but rather is used merely to describe the type of claim (*in rem*) the Merchant will not make.

This argument is unpersuasive because interpreting the word "vessel" to refer to an *in rem* claim still supports an interpretation that the "Merchant" (*i.e.,* plaintiffs) agrees not to assert any claim against a servant, agent or sub-contractor which attempts to impose upon any of them "any liability ... in connection with the goods," whether the claim is *in personam* against the servant, agent or sub-contractor or *in rem* against "any vessel owned or operated by ... them." Accordingly, I interpret this clause to mean that plaintiffs are precluded from asserting an *in rem* claim against any vessel owned or operated by a servant, agent or sub-contractor as those terms are defined in the bill of lading. The COUGAR ACE falls within those terms.

---

[1] Subcontractors are defined in the bills of lading to include "owners and operators of Vessels and ... any independent contractor directly or indirectly employed by the Carrier in performance of the Carriage ... and anyone assisting the performance of the Carriage."

Plaintiffs contend that the second sentence of the Himalaya clause eliminates any doubt that the term "vessel" is not being used to identify an intended Himalaya beneficiary, as it confers the benefits of the bill of lading exclusively upon servants, agents, and Sub-Contractors, but not the "vessel": "Without prejudice to the foregoing, every such servant, agent and Sub-Contractor shall have the benefit of all provisions herein benefitting the Carrier ..." (Emphasis added).

In *Norfolk Southern Railway,* the Court held that such "linguistic specificity" is not required to invoke a Himalaya clause. 543 U.S. at 31. In this case, as in *Norfolk Southern Railway,* the broad language of the Himalaya clause ("no claim or allegation shall be made against *any* servant, agent or Sub-Contractor of the Carrier which imposes or attempts to impose *upon any of them, or upon any vessel owned or operated by any of them, any liability whatsoever*") indicates an intent to extend the defenses of the contract broadly to any entity whose "services contribute to performing the contract." *Id.* (noting expansive meaning of the word "any"). The services provided by MOB Cougar and the COUGAR ACE are services that are within the carrier's contractual duties. *Id.*

3. *Do the bills of lading expressly contemplate that in rem claims may be filed against the COUGAR ACE?*

Plaintiffs argue that because provisions of the bills of lading other than the Himalaya clause expressly acknowledge that *in rem* claims may be filed against the "vessel," this is conclusive evidence that the COUGAR ACE is not a Himalaya clause beneficiary. Plaintiffs direct the court to paragraph 32, the provision incorporating COGSA for carriage to or from a port of the United States. Subsection (2) of paragraph 32, the limitation of liability provision, states:

> (2) If U.S. COGSA applies as (1) above, neither the Carrier, *nor the Vessel* shall, in any event, be or become liable for any loss or damage to or in connection with the Goods in an amount exceeding $500 per package, lawful money of the United States, or in case the Goods are not shipped in packages, per customary freight unit unless the value of the Goods has been declared and inserted in the declared value box on the face hereof, in which case Clause 5(5) shall apply.

(Emphasis added). Plaintiffs argue that clause 5(7) also recognizes that claims may be made against the vessel:

> ... In any event the Carrier *and the Vessel* shall be discharged from all liability in any capacity whatsoever for any loss or damage to the Goods, unless suit is brought within one year after

> delivery of the Goods or the date when the Goods should have been delivered.

(Emphasis added).

Plaintiffs argue from these provisions that express language used in the bills of lading anticipates that claims may be asserted against the COUGAR ACE, by incorporating COGSA when the carriage is to or from United States ports. They point out that under COGSA, the COUGAR ACE, as well as the carrier, is potentially liable for cargo loss occurring during transit. See, e.g., COGSA §§ 1304(1), (2), (3), (5) (rights and immunities of carrier and ship).

The plaintiffs' argument that the bills of lading incorporate COGSA, and that COGSA contains provisions that contemplate *in rem* cargo claims in admiralty, begs the question. Himalaya clauses are typically accompanied by an incorporation by reference to COGSA. See *Admiralty and Maritime Law* § 10-8: "It is settled law that the Himalaya clause is valid if COGSA is incorporated by reference ... into the bill of lading.... However, the benefit of a Himalaya clause will not be extended to a cargo handler after the delivery to the consignee when COGSA is no longer applicable...." *Id.*

The fact that COGSA applies to both carrier and ship, and that a ship may be liable for cargo claims as well as the carrier, does little to support the plaintiffs' argument that the forum selection clause should be applied to the carrier, but not to the ship.

Conclusion

The COUGAR ACE ratified the bills of lading by sailing with the cargo. Because the COUGAR ACE's status under the bills of lading is essentially that of the carrier, the COUGAR ACE is entitled to invoke the defenses, as well as the liabilities, of the contract of carriage. On that basis, the COUGAR ACE is entitled to invoke the protection of the forum selection clause.

MOB Cougar's alternative argument, that the COUGAR ACE is the third-party beneficiary of the Himalaya clause and entitled to the protection of the forum selection clause for that reason, is logically more convoluted, but leads to the same result. Under *Norfok Southern Railway,* Himalaya clauses are to be construed so as to give effect to the contract language and the intent of the parties. The Himalaya clause in this case is broadly written and indicates an intent to extend its terms broadly, to any entity whose services contribute to performing the contract of carriage. The COUGAR ACE satisfies that requirement.

I recommend that this action be dismissed on the basis of the forum selection clause.

Scheduling Order

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due July 19, 2007. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due August 2, 2007, and the review of the Findings and Recommendation will go under advisement on that date.

DATED this 5th day of July , 2007

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-CV-72574-DT

[Filed November 18, 2005]

ROYAL INSURANCE CO. OF)
AMERICA and FORD MOTOR CO.,)
Plaintiffs,)
)
v.)
)
ORIENT OVERSEAS CONTAINER)
LINE LTD,)
Defendant/Third-Party Plaintiff,)
)
v.)
)
M/V "CANMAR PRIDE," her engines,)
boilers, appurtenances, etc., *in rem*, CP)
SHIPS (UK) LTD, CPS NO. 3 LTD and)
CPS NO. 5 LTD,)
Third-Party Defendants.)
)

HONORABLE DENISE PAGE HOOD

ORDER RE: MOTION PURSUANT TO FED. RULE CIVIL PROC. 60(b) TO AMEND ORDER TO PERMIT APPEAL

On September 29, 2005, the Court entered a Memorandum Opinion and Order Regarding Motions for Partial Summary Judgment. Although Plaintiffs' current motion is brought under Rule 60(b) to amend the Court's September 29, 2005 Order to permit an appeal, the Court finds that such an amendment is not required because Plaintiffs are essentially seeking certification to appeal the Court's Order under 28 U.S.C. § 1292(b). Defendant and Third-Party Defendants concur with Plaintiff's request.

The general rule is that the court of appeals may only review final orders issued by the district court under 28 U.S.C. § 1291. Interlocutory appeals under § 1292(b) are an exception to the general policy against piecemeal appellate review set forth in § 1291. Section 1292(b) is to be used sparingly. *Vitols v. Citizens Banking Co.*, 984 F.2d 168, 170 (6th Cir 1993). The express language of 28 U.S.C. § 1292(b) requires that the district court must find that an order involves a controlling question of law about which there is substantial ground for difference of opinion and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Sixth Circuit has set forth four elements to establish certification: 1) the question involved must be one of "law"; 2) it must be "controlling"; 3) there must be substantial ground for "difference of opinion" about it; and 4) an immediate appeal must materially advance the ultimate termination of the litigation. *Vitols*, 984 F.2d at 170.

Applying the requirements for certification to the instant case the Court finds that Plaintiffs have met the certification requirements. Plaintiffs have shown that the question involved is one of "law" and is "controlling" in this case. Based on the parties' brief supporting their arguments on the partial summary judgment motion, Plaintiffs have shown that there is a substantial ground for a "difference of opinion" on the issues concerning the applicability of United States Carriage of Goods by Sea Act, 42 U.S.C. § 1304 and its package limitation. Plaintiffs have also shown an immediate appeal will materially advance the ultimate termination of the litigation. The Court certifies under 28 U.S.C. § 1292(b) that an interlocutory appeal from the Court's September 29, 2005 Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court notes that Defendant and Third-Party Defendants' concurrence is conditioned upon entry of an Order for Plaintiffs not to proceed in the Canadian litigation until the resolution of the instant matter. However, Defendant and Third-Party Defendants did not provide any law to support their request for such an order and whether this Court had any authority to enter such an order.

Accordingly,

IT IS ORDERED Plaintiffs Motion Pursuant to Fed. Rule Civil Proc. 60(b) to Amend Order to Permit Appeal, considered by the Court as a Motion for Certification under 28 U.S.C. § 1292(b) to file an interlocutory appeal from the Court's September 29, 2005 Order **(Docket No. 66, filed October 11, 2005)** is GRANTED.

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: November 18, 2005

I hereby certify that a copy of the foregoing document was served upon counsel of record on November 18, 2005, by electronic and/or ordinary mail.

s/William F. Lewis
Case Manager

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-0107

[Filed February 6, 2006]

In re: ROYAL INSURANCE COMPANY OF AMERICA; FORD MOTOR COMPANY,)
Petitioners.)

ORDER

Before: KENNEDY, BATCHELDER, and MOORE, Circuit Judges.

The plaintiffs petition for permission to appeal the September 29, 2005, order granting the motions for partial summary judgment filed by the defendant and the third-party defendants. The order was certified by the district court under 28 U.S.C. § 1292(b), and the defendant third-party plaintiff and the third-party defendants concur in the petition for permission to appeal.

To obtain permission to appeal the plaintiffs must show that: (1) the question involved is a question of law; (2) the question is controlling; (3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); *see In re City of Memphis,* 293 F.3d 345, 350 (6th Cir. 2002); *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974). "Review under § 1292(b) is granted sparingly and only in exceptional cases." *In re City of Memphis*, 293 F.3d at 350; *see Kraus v. Bd. of County Rd. Comm'rs for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966). The plaintiffs have demonstrated that an interlocutory appeal is warranted in this case.

Therefore, the petition for permission to appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/s/
Clerk

A TRUE COPY
[attestation and seal]

APPENDIX G

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 03-72574 (DPH) (TAC)

[Filed February 3, 2005]

ROYAL INSURANCE COMPANY OF AMERICA
and FORD MOTOR COMPANY,
Plaintiffs,

vs.

ORIENT OVERSEAS CONTAINER LINE
LIMITED,
Defendant.

ORIENT OVERSEAS CONTAINER LINE
LIMITED,
Third-Party Plaintiff,

vs.

M/V CANMAR PRIDE, her engines,
boilers, appurtenances, etc., in rem,
CP SHIPS (UK) LIMITED, CPS NO. 3
LIMITED and CPS NO. 5 LIMITED,
Third-Party Defendants.

The Deposition of ALAN D. DUNN, a Witness herein, taken pursuant to Notice of Taking Deposition before Shari Blythe Holtz, CSR-3910, Registered Professional Reporter and Notary Public within and for the County of Wayne, State of Michigan, at 3 Park Lane Boulevard, Park Lane Towers, West Tower, Dearborn, Michigan, on Wednesday, January 5, 2005, commencing at about 10:00 a.m.

(Appearances on page 2.)

* * *

[p.32]

you've already testified to that, correct, sir?

A Correct.

Q And isn't it a fact that OOCL's bill of lading is part of that contract?

A Correct.

Q So therefore, Ford would have agreed to the terms and conditions and limitations of the bill of lading as attached to that contract prior to its execution, right?

A Yes.

Q I'm sorry if I'm not making my questions clear. You are doing the right thing by asking me to rephrase. We'll eventually get to it. Sometimes I struggle a little bit.

MR. MEYER: Let's have this marked as 5.
(Dunn Deposition Exhibit 5 was marked for identification; attached hereto.)

BY MR. MEYER:

Q Sir, I show you what's been marked as Deposition Exhibit 5 and I'm going to direct your attention to the bottom of the first page and do you know what that last entry dated July 19, 2000 is?

A It's a note from me: Attached is the final version of the ocean transportation service contract.

Q It's a note from you to whom, sir?

A To Keith Slack. Well, to actually all the carriers.

Q That were bidding?

* * *

[p.34]

carrier's bill of lading, general average and other liability cost related issues it is required to have our Vice President of Purchasing sign off on the limited liability."

BY MR. MEYER:

Q Now, when you said limited liability, quote, unquote, what did you mean by that?

A The liability per the bill of lading.

Q And was it your understanding that OOCL's bill of lading limited their liability?

MR. SWEENEY: Note my objection.

A Well, go ahead. Repeat your question again.

MR. MEYER: Could you read it back, please.

(Record repeated.)

A. Yes.

BY MR. MEYER:

Q Have you ever heard of the Carriage of Goods by Sea Act, also referred to as COGSA, which is C-O-G-S-A?

A I've heard of it, yes.

Q And have you heard of COGSA prior to March of 2003?

A Yes.

Q And are you aware that COGSA has a $500 package limitation provision?

A Vaguely.

Q And were you so vaguely aware of that $500 package

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BY MR. MEYER:

Q I'll take the answer.

A It could.

Q In fact, did any carrier that you dealt with concerning the Transportation Services Main Agreement ever tell you that there was a $500 limitation that would apply to their liability under the Transportation Services Main Agreement?

A Tell me that?

Q Yes.

A Verbally?

Q Or in writing.

A No.

Q Did you ever read any carrier's bill of lading that contained language that the $500 package limitation would apply?

A No.

Q You left that to Ford legal?

A Yes.

Q To your knowledge, did Ford declare its cargo's value on OOCL's bills of lading, Exhibit 1, and agree to pay additional freight charges based upon the declared value?

A No, we did not take out additional insurance.

Q Concerning the transportation of Ford's cargo as evidenced by Exhibit 1, the bills of lading, are you

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